

***United States Court of Appeals
for the Second Circuit***



APPENDIX

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76-2037

United States Court of Appeals
For the Second Circuit

UNITED STATES OF AMERICA
ex rel. PAUL ROBINSON,

Petitioner,

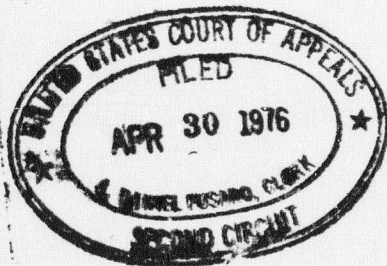
-against-

WARDEN AUBURN CORRECTIONAL FACILITY,
State of New York, District Attorney,
Kings County, State of New York,

Appellees.

On Appeal from the United States District Court, Eastern District of New York

Appendix



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PERTINENT DOCKET ENTRIES

Petition for writ of habeas corpus filed.

11-11-75 ORDER TO SHOW CAUSE filed.

11-11-75 PETITIONER'S BRIEF FILED.

4-7-75 AFFIDAVIT OF JOHN P. SCANNELL IN
OPPOSITION FILED.

4-9-75 CASE CALLED. ORAL ARGUMENT ON
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RESERVED.

3-10-76 MEMORANDUM OF DECISION AND
ORDER DISMISSING PETITION FILED. (Judge
Mishler)

3-12-76 JUDGMENT THAT PETITIONER TAKE
NOTHING OF THE RESPONDENTS AND THAT
PETITION IS DISMISSED FILED.

3-25-76 NOTICE OF APPEAL FILED.

4-14-76 CERTIFICATE OF PROBABLE CAUSE
DATED 4-12-76 FILED.

MEMORANDUM OF DECISION AND ORDER

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK**

UNITED STATES OF AMERICA
ex rel. PAUL ROBINSON,

Petitioner,

-against-

WARDEN AUBURN CORRECTIONAL FACILITY,
State of New York, District Attorney,
Kings County, State of New York,

Respondents.

March 10, 1976

MISHLER, CH. J.

Petitioner was convicted of the crimes of felony murder, attempted robbery in the first degree and attempted grand larceny. N.Y. Penal L. §§125.25(3), 110.00/160.15 and 110.00/155.30 (McKinney 1975), in Supreme Court, Kings County, in 1973. Petitioner was sentenced to concurrent terms of fifteen (15) years to life on the murder charge, ten (10) years on the attempted robbery charge and a conditional discharge on the attempted grand larceny charge. Petitioner now seeks a writ of habeas corpus from this court, claiming that the trial court's charge violated the defendant's fifth and fourteenth amendment right to due

process by requiring the defendant to prove his innocence on the felony murder charge. The petition claims that: (1) an erroneous notion was conveyed to the jury when the court instructed them that the defendant had interposed an affirmative defense and that in so doing, the petitioner had admitted his guilt to the underlying felony; and (2) by "in essence . . . declaring that the People had proved the charge of murder, which shifted the burden upon the defendant to come forth and testify to prove his innocence," the court relieved the state of its obligation to prove all the essential elements of the crime beyond a reasonable doubt as required in *In re Winship*, 379 U.S. 598, 90 S.Ct. 1068 (1970), and *Mullaney v. Wilbur*, 421 U.S. 684, 95 S. Ct. 1881 (1975). For the reasons stated below, the court denies the writ and dismisses the petition.

I. PETITIONER'S STATE TRIAL AND APPEAL

The facts of petitioner's criminal activity which were proven at trial, interpreted in the light most favorable to respondents,¹ were as follows.² On the night of the crime, the murder victim, Germaine Phillips, and her boyfriend, Alberto Greene, were in Lincoln Terrace Park. Petitioner and two other men, Gargo and George, entered the park and walked past Phillips and Greene, then turned around and surrounded the couple. Wielding a knife, one of the men (not petitioner) ordered Greene to empty his pockets. Greene said he had no money. The other man (not petitioner) held a gun to Greene's stomach. When Greene attempted to escape from the robbers he was partially blocked by petitioner. The man with the gun fired and Phillips was fatally wounded.

Petitioner testified in his own defense at the trial. He stated that his walking in the park with Gargo and George

was coincidental; that his presence in the park at the time and place they attempted the robbery was fortuitous and unpredictable; that he never discussed committing a robbery with Gargo and George; and that he did not know that Gargo and George intended to commit a robbery nor that they were armed.

II. REVIEWABILITY OF PETITIONER'S CLAIMS

Petitioner appealed his conviction to the Appellate Division of the Supreme Court, Second Judicial Department, 43 A.D. 2d 908, 351 N.Y.S.2d 647 (2d Dept. 1974) (aff'd. without opinion), and to the New York Court of Appeals, 36 N.Y.2d 224, 367 N.Y.S.2d 208 (1974). Petitioner's main contention on appeal was that the judge's charge mistakenly informed the jury that petitioner had asserted the affirmative defense to felony murder, and that the effect of the charge was to mislead the jury on the prosecutor's burden of proving petitioner's guilt.³

Petitioner's conviction was reviewed by New York's highest appellate court, and he has therefore exhausted his state remedies and is properly before this court, 28 U.S.C. §2254.

III. DISCUSSION

"A jury charge in a state trial is normally a matter of state law and is not reviewable on federal habeas corpus absent a showing that the alleged errors were so serious as to deprive defendant of a federal constitutional right. *Cupp v. Naughten*, 414 U.S. 141, 94 S.Ct. 396, 38 L.Ed.2d 368 (1973); *Schaefer v. Leone*, 443 F.2d 182 (2d Cir.), cert. denied, 404 U.S. 939, 92 S.Ct. 277, 30 L.Ed.2d 251 (1971)" *United States ex rel. Smith v. Montayne*.

505 F.2d 1355, 1359 (2d Cir. 1974). The judge's charge here, though at times confusing, did not constitute a transgression of fundamental constitutional guarantees. *United States ex. rel. Colon v. Follette*, 366 F.2d 775 (2d Cir. 1966); *Grundler v. North Carolina*, 382 F.2d 798, 802 (4th Cir. 1960). The opportunity for clarification was offered defendant⁴ after the charge was given and before the jury started to deliberate.⁵ The claim of error was waived. *United States ex rel. Satz v. Mancusi*, 414 F.2d 90 (2d Cir. 1969); *United States v. Nasta*, 398 F.2d 283, 285 (2d Cir. 1968).

The New York felony murder statute, N.Y. Penal Law §125.25(3) (McKinney 1975),⁶ gives "... a non-killer defendant of relatively minor culpability a chance of extricating himself from liability for murder, though not, of course, from liability for the underlying felony."⁷ The conditions under which a non-killer defendant may extricate himself are described in the statute as an affirmative defense. Petitioner's claim, based on the judge's use of the phrase "affirmative defense", therefore, indirectly challenges the constitutionality of the statute by reference to *Mullaney, supra*. *Mullaney* held that a Maine statute requiring a defendant charged with murder to prove that he acted in the heat of passion on sudden provocation in order to reduce the charge to manslaughter was a violation of due process, in that it relieved the prosecution from proving beyond a reasonable doubt an essential element of the crime of murder, *i.e.*, malice.⁸

The felony murder doctrine had its origin in the common law during an era when nearly all felonies were punishable by death. Because this often resulted in a barbaric application, the doctrine passed through a series of judicial and later legislative restrictions and limitations. However,

both at common law and under the New York statute (*supra*), a felonious homicide is made murder in the first degree by operation of the legal fiction of transferred intent, which thereby characterizes the homicide as committed with malice prepense. It is the malice of the underlying felony that is attributed to the felon. Thus, a felony murder embraces not any killing incidentally coincident with the felony, but only those committed by one of the criminals in the attempted execution of the unlawful end. Although the homicide itself need not be within the common design, the *act* which results in death must be in furtherance of the unlawful purpose.

In other words, in order for a felon to be guilty of the homicide, the act (as in agency) must be "either actually or constructively his, and it cannot be his act in either sense unless committed by his own hand or by someone acting in concert with him or in furtherance of a common object or purpose" If the lethal *act* is in furtherance of their common purpose, the accomplice is guilty even though there was an express agreement not to kill, or even if he actually attempts to prevent the homicide.

People v. Wood, 8 N.Y.2d 48, 51-52, 201 N.Y.S.2d 328, 331-33 (1960) (citations and footnotes omitted). See *United States v. Branick*, 495 F.2d 1066, 1069 (D.C. Cir. 1974); *United States v. Heinlein*, 490 F.2d 725, 735-36 (D.C. Cir. 1973); 1 Wharton, Criminal Law and Procedure §251.

Section 125.25 (3)(a) was intended to alleviate the harsh result that existed under the predecessor statute (§1044(2)),⁹ by giving the defendant the opportunity ". . . to fight his way out of a felony murder charge by

persuading a jury, by way of affirmative defense, that he not only had nothing to do with the killing itself but was unarmed and had no idea that any of his confederates was armed or intended to engage in any conduct dangerous to life"10 The prosecutor is not relieved of proving any essential element of the crime of felony murder under N.Y. Penal Law §125.25(3) (McKinney 1975). Neither the statute nor the court's charge required the defendant to admit the commission of the underlying felony in order to assert his affirmative defense under the statute. Indeed, he took the witness stand and denied participation in the robbery attempt.

Reading the charge in its entirety, this court is convinced that the jury was fairly advised of the prosecution's burden in proving the guilt of the defendant of the felony murder charge by proof beyond a reasonable doubt, and of the statutory right granting the defendant the opportunity to exculpate himself from the murder by establishing his affirmative defense by a fair preponderance of the credible evidence.

Petitioner suggests that the mere requirement under the statute that a defendant assert an affirmative defense is violative of the due process clause. The Court in *Mullaney, supra*, made clear that it did not intend to strike the requirement in many statutes that a defendant show some evidence that he acted in the heat of passion "before requiring the prosecution to negate this element by proving the absence of passion beyond a reasonable doubt." (421 U.S. at 701 n. 28, 95 S.Ct. at 1891 n. 28.

The court finds N.Y. Penal Law §125.25(3) (McKinney 1975) within the constitutional limits established in *In re Winship* as explicated by *Mullaney*, and that the charge did not violate petitioner's right to due process.

The petition is dismissed, and it is
SO ORDERED.

The Clerk of the Court is directed to enter judgment in
favor of the respondents and against the petitioner
dismissing the petition.

s/Jacob Mishler
U.S.D.J.

FOOTNOTES

1. *United States v. Singleton*, 75 1114 (2d Cir. February
13, 1976).

2. These facts are drawn from Respondents' Affidavit in
Opposition at pp. 2-4.

3. The court's charge in pertinent part stated the
following:

And the People have the burden of proving the
defendant guilty beyond a reasonable doubt except
to what we call an affirmative defense, which I will
get to you later.

.

First, the People must prove that a homicide
took place. And then comes the question of, what
kind of a homicide was it, a murder, was it a
manslaughter, and the law provides, gentlemen,
that a person is guilty of murder when, acting
alone or with one more other person, he commits
or attempts to commit robbery, and in the course
of and in furtherance of such crime or immediate
flight therefrom, he or another participant, if there
be any, causes the death of a person other than one
of the participants.

.

The People have the burden of proving the defendant guilty beyond a reasonable doubt except in certain instances, and I read to you the section about a person being guilty of a murder when, acting alone or with one other person he commits or attempts to commit robbery and in the course of and in furtherance of such crime or of immediate flight therefrom he or another participant, if there be any, causes the death of a person other than one of the participants.

Then, the law goes on to read, except that in any prosecution under this subdivision in which the defendant was not the only participant in the underlined crime, as an affirmative defense, the burden of proving this is on the defendant, that the defendant, one, did not commit the homicidal act or in any way solicit, request, command or importune or aid the commission thereof, and that he was not armed with a deadly weapon or any other instrument, article or substance . . . [a]nd that he had no reasonable ground to believe that any other participant intended to engage in conduct likely to result in death or serious injury.

I told you that the burden is on the People to prove the defendant guilty beyond a reasonable doubt, but the defendant has the burden of proving all of those elements of his affirmative defense and the burden of proving an affirmative defense rests upon the defendant. That means that it must be established by a fair preponderous [sic] of the credible evidence that the claim that the defendant makes is true.

The credible evidence means the testimony or exhibits found to be worthy of being believed. Preponderous [sic] means the greater part of such

evidence. This does not mean the greater number of witnesses or greater amount of time taken by either side. The phrase refers to the quality of the evidence. That is, its consisting quality. The weight in effect is for you to determine.

The law requires that, in order for a defendant to prevail, the evidence that supports his affirmative defense must appeal to you as more clearly representing what took place than opposed to his claim. If it does not and the weight is so evenly balanced that you would be unable to say which evidence has the greatest weight on either side, then you must resolve the question in favor of the People, because it is only if the evidence favors the defendant's claim, the evidence opposed to it, that you can find in favor of the affirmative defense for the defendant. You understand the fact that he has interposed this affirmative defense.

Now, the burden of proving an affirmative defense is, as I say, on him.

The burden of proving that he participated in this crime, that he was acting in concert, is on the People. In other words, if he were there with the intent to commit a crime and participates in it with that intent, then he is guilty, if you are satisfied as to that beyond a reasonable doubt.

On the other hand, if you are satisfied beyond a reasonable doubt that he was there, that he intended to participate, but he did not know one of his fellow was armed—and there is no proof that he, here, himself committed a homicide—no proof that he was armed, but he must prove that he had no reasonable ground to believe that any other participant intended to engage in the conduct. The burden of proving that is on him. That's if you are

satisfied beyond a reasonable doubt that he was not a mere spectator, if you are satisfied beyond a reasonable doubt that he was not.

4. In *United States ex rel. Smith v. Montayne*, where the petitioner claimed the charge "was confusing in a variety of ways", the court said, "It should be noted in addition that defendant's counsel did not request a specific charge, nor did he make objection to the judge's charge on any of the points currently before this court." 505 F.2d at 1359.

5. The court asked counsel, "Do you have any exceptions?" Defendant's counsel answered, "I have no exceptions."

6. The text of N.Y. Penal Law §125.25(3) is as follows:

A person is guilty of murder in the second degree when:

.....

3. Acting either alone or with one or more other persons, he commits or attempts to commit robbery, burglary, kidnapping, arson, rape in the first degree, sodomy in the first degree, sexual abuse in the first degree, escape in the first degree, or escape in the second degree, and, in the course of and in furtherance of such crime or of immediate flight therefrom, he, or another participant, if there be any, causes the death of a person other than one of the participants; except that in any prosecution under this subdivision, in which the defendant was not the only participant in the underlying crime, it is an affirmative defense that the defendant:

(a) Did not commit the homicidal act or in any way solicit, request, command, importune, cause or aid the commission thereof; and

(b) Was not armed with a deadly weapon, or any instrument, article or substance readily capable of causing death or serious physical injury and of a sort not ordinarily carried in public places by law-abiding persons; and

(c) Had no reasonable ground to believe that any other participant was armed with such a weapon, instrument, article or substance; and

(d) Had no reasonable ground to believe that any other participant intended to engage in conduct likely to result in death or serious physical injury.

7. N.Y. Penal Law §125.25 (McKinney 1975), Practice Commentaries by Arnold D. Hechtman.

8. In *In re Winship, supra*, the court held that the prosecution was required to prove the underlying crime in a juvenile delinquency proceeding by proof beyond a reasonable doubt and implicitly held that §744(b) of the New York Family Court Act, which provides that proof of the underlying criminal act may be established by a preponderance of the evidence, is unconstitutional.

Petitioner cites *Stump v. Bennett*, 398 F.2d 111 (8th Cir.) *cert. denied*, 393 U.S. 101, 89 S.Ct. 483 (1968). In *Stump*, the court held that an Iowa statute requiring a defendant to plead and prove his alibi defense was constitutionally impermissible. The court held:

"... when the burden of persuasion is shifted to the defendant to disprove essential elements of a crime, as it was in the instant case, then it is certain that the due process clause of the Fourteenth Amendment has been violated."

398 F.2d at 118.

The holding here is consistent with the holding in *Stump*. The court also said in *Stump*:

"... an affirmative defense generally applies to justification for his admitted participation in the act itself."

398 F.2d at 116.

Though an affirmative defense may be in the nature of a confession and avoidance, it is not necessarily so. In the case at bar the affirmative defense offered by petitioner in no way admitted participation in the underlying felony. It went no further than to admit his fortuitous presence.

9. Section 1044 defined felony murder as:

The killing of a human being, unless it is excusable or justifiable . . . when committed:

2. . . . by a person engaged in the commission of, or in an attempt to commit a felony, either upon or affecting the person killed or otherwise

The statute did not provide a defense to a non-killer felon, no matter how peripheral his involvement in the felony.

10. N.Y. Penal Law §125.25 (McKinney 1975), Practice Commentaries by Arnold D. Hechtman.

Alberto Greene—for People—Direct

MR. ALBERTO GREENE, of 437 Manhattan Avenue, New York, having been duly sworn, testified as follows:

Examination by Mr. Davenport:

Q. Did you know a Germain Phillips in her life time?

A. Yes.

Q. What was your relationship to her? A. She was my girlfriend.

Q. Were you with her August 13, 1971? A. Yes.

Q. Where were you with her? A. I was in—at present, I don't remember the name of the park.

Q. Was it a park here in Brooklyn? A. Yes.

Q. And did something happen while you were in that park? A. Yes.

Q. Would you tell the jury what occurred? A. While I was in the park, me and my girlfriend were exiting the park when three gentlemen came in and they walked by us. They passed us, walked a few feet away, stopped, came back and surrounded her. And as they surrounded us, one of the gentlemen in the middle facing me said to me with his hands pointed towards my face to empty my pockets. So I held on to my pocket and I said I didn't have any money. And at the same time I heard a click on my right hand side. And I look and I saw this gentleman with a knife. So, as I was backing up to the wall, I was trying to move away. He pointed the gun to my stomach.

Q. Which one had the gun? A. The fellow that was standing facing me.

Q. In the middle of the three, is that right? A. Yes. He pointed the gun to my stomach and he fired. I heard a click. As soon as I heard the click, I held on to my girl friend's hand and we tried to run. And I heard a POW, and we

Alberto Greene—for People—Direct

ran into—it was like a basketball court. We ran into the center and as we ran, I felt like she had like felt a weight and I looked down and she was bleeding.

So we ran out. When we were in the middle of the court we ran out through an exit and went out to the street where I bent down in the street holding her. And I asked for help.

Mr. Kaplan: I object to anything—

The Court: Yes, don't tell us what you said to her.

Q. Was there a reason as you were exiting the park, were you on the way to an exit from the park? A. Yes, we was. We were going, coming out of like this, you know, it's like a playground where they have a basketball, baseball, we were coming out. We were just trying to get to the stairway to get out to walk out into the street.

Q. Why did you have to go through the basketball court?

Mr. Kaplan: I would object to the use of the word, "Why".

The Court: I will allow that.

A. This was the way home. So we walked through there and was trying to get out to the street.

Q. What if anything did the third person, the one that was on your left, do? A. While the incident was taking place, the fellow that was on my left, he was this guy in the middle was standing here with the gun and this guy over here had the knife, so I was holding my girl friend's hand. So this fellow on my left, he was moving towards the wall.

And as soon as I heard the second, you know, the first POW, I ran, because he came back this way. So I couldn't go that way. So I ran through now into the middle of the basketball court and turned and ran back.

Alberto Greene—for People—Cross

The Court: You mean you ran between the man on your left and the man in front of you?

Witness: Yes.

Q. Did the man on your right say anything? A. No.

Q. Did the man on your left say anything? A. No.

Q. He didn't say anything at all? A. No.

Examination by Mr. Kaplan:

Q. Mr. Greene, you testified in a previous trial about this case, didn't you? A. Yes.

Q. And the man who had the gun, did you identify him? A. Yes.

Q. Who did you identify as the man with the gun? A. Well, you mean his name?

The Court: Did you learn his name?

Mr. Kaplan: If you remember.

Witness: His name was Rudolph Mills.

Q. Who did you identify as the other man being there? A. The man on my right was Glen Darian.

Q. There was a third man there, is that right? A. Yes.

Q. And while all this was taking place, did you observe the man with the gun? A. Yes.

Q. Was your attention directed to the man with the gun? A. Well, my attention was directed to the man with the gun and to the man with the knife which was on my right.

Q. And you were naturally frightened, right? A. Yes.

Q. You didn't pay too much attention to the third man there, did you? A. No.

Mr. Kaplan: I have no further questions.

Alberto Greene—for People—Redirect

The Court: Did the man on the left who you could not identify, you say he moved to the left and that created space between Mills and him for you and your girl friend?

Witness: To run out.

Examination by Mr. Davenport:

Q. But you were proceeding in a direction to your left?

A. This was a man on my right, a man facing me. This other fellow was here. The third man was on my left. Whether the man with the gun—when the man with the gun, when I heard the first click, I tried to run because I was sure it was a gun, but this man on my left, he moved. See, this is an exit, see, if I ran straight down the wall, there is an exit I could go through, but this man moved from here to the wall, so had to run into the middle of it.

The Court: Did he obstruct your running to the left or did he open you a path to run between him and the man in the middle?

Witness: See, at that time I am aware that there is an exit on my left. So at that time I tried to run straight down on the wall to the exit, but as he came over to the wall, I had to run through into the court and then turn back.

Q. In other words, the basketball court is not an exit. That made you go in a different direction. The exit was to your left, is that correct? A. Right.

Q. And that exit was blocked or impeded by the person on your left moving towards the left? A. Right.

Alberto Greene—for People—Re-Cross

Examination by Mr. Kaplan:

Q. Let me show you some pictures. Tell me, did you recognize that area? A. Yes.

Q. And what area is that? A. (There was no response.)

Q. Just tell me what area this is. Is that the park you were in? A. Yes.

(Picture offered and received in evidence)

Q. Let me show you this picture and ask you if that's a picture of the area. A. Yes.

Q. What is that a picture of? A. This is a picture of the area where I was in at the time.

(Another picture offered and received in evidence)

Q. I want you to look at Defendant's Exhibit A and Defendant's Exhibit B and see if you can mark or point to either one of those pictures as to where you and Miss Phillips were the night that this incident took place.

The Court: Put down G for yourself and P for Miss Phillips.

Q. Can you do that on both pictures, please Mr. Greene. Now, on those pictures, can you show me where the three men were standing, and I would mark them, one for the fellow with the gun, two for the fellow with the knife, and three for the individual who had nothing.

The Court: From right to left rather than from left to right.

Alberto Greene—for People—Re-Cross

Witness: Do you want this in both pictures?

Mr. Kaplan: Yes, in both pictures.

Q. May I look at them, please. After when this one person pulled the gun out and I think you told me that was Mills, right, and after the shooting took place, you started to run, or before the shooting? A. As soon as I heard the click.

Q. I want you to show me the direction in which—take a look at Defendant's Exhibit A and B, and explain to the Court and the jury the direction in which you ran with respect to where the fences are. A. (No response.)

Q. In other words, which end did you come out of? Did you come out through this end? A. I came out this end, right here. And on this picture, would be coming back this way.

Q. Do you want to put an arrow there. Mr. Greene, was this the first night you had been in this park? A. No.

Q. You have been in that park many times? A. In that park many times, right.

Q. Can you estimate how wide that areaway is or walkway? A. (No response.)

Q. By the way, I am referring between the fence and A. Yes. It would be approximately as wide as from this wall to right where this gentleman is sitting here.

Q. To about here from this wall to about here? A. Yes.

The Court: Indicating about seven or eight feet.

Q. Seven or eight feet, or more? A. Approximately about that.

Q. And there is room for several people to stand in that areaway, isn't there? A. Yes.

Alberto Greene—for People—Re-Cross

Q. You said that the person without the gun and without the knife, what did he do when you started to run?

A. When the fellow, when I heard the click, this fellow which was on my left—

Q. Let me just—This is the fellow without anything?

A. Yes.

Q. Was he against the wall or against the fence or standing in the areaway when you heard the click? A. When I heard the click, he was standing off the wall and off the fence. In other words, he was—

Q. When you say off the wall and off the fence, was he standing in the middle? A. Yes. In that particular direction he would be in the middle of the wall and the fence.

Q. In that areaway? A. Yes.

Q. And then what happened? A. As soon as I heard the click, I was holding my girl friend's hand, so I am starting to run now, and he moved from there on towards the wall.

Q. In other words, he moved away, back towards the wall? A. He didn't move away. See, this would be the wall here. (Witness leaves chair at this time and walks to wall in courtroom) And he is standing here. I am standing here. So when I heard the click, and I am going to run, I am supposed to be running in this direction. But when I do like this, this fellow moves—

Q. He backed up against the wall? A. Yes. In other words, I cannot pass.

The Court: Let's take it this way. Let's assume you were up against the wall.

Witness: Yes, sir, right.

The Court: With your back to the wall, and we will take it would be six o'clock, the man in front of you was at twelve o'clock, is that right, directly in front of you, the man in the middle?

Alberto Greene—for People—Re-Cross

Witness: Yes.

The Court: And the man on your left as you were caught, was between ten and eleven o'clock, is that right?

Witness: Right.

The Court: And then when you heard the click, he moved to nine o'clock to your left shoulder, is that right?

Witness: What time would that be?

The Court: You would be six o'clock.

Witness: I don't really know if I understand that. But this is the man here.

The Court: Let's assume that that rail there is the wall.

(At this time the witness is standing at the rail just in front of the audience section of the courtroom.)

Witness: This is the wall, here. And I was standing here. The fellow with the gun is here and the man standing right here. But when I heard the click, I tried to run.

The Court: He moved into your path?

Witness: So I run through here as soon as I get an open space here, because the fellow with the gun is right here and the fence is here, so as soon as I get to this open space I run through here and run to the middle and come back there.

Q. Mr. Greene, the fellow without any weapon, he didn't stop you did he? A. He couldn't stop me.

Q. But he made no attempt to stop you, did he? A. Well, look, I run through him. I don't know if he raised his hand, I don't know.

Alberto Greene—for People—Re-Direct

Q. You don't know what he did. You don't know whether or not he jumped back in surprise or what, do you? A. No.

Q. All you know is that he moved? A. That's all I know, he moved towards the wall.

Q. You weren't paying any attention to him. You were worried about the man with the gun, weren't you, Mr. Greene? A. Exactly.

By Mr. Davenport:

Q. But the way to get out would have been to move this way? A. Right.

Q. And you were stopped from moving this way from the man on the left who moved in your path? A. Right.

Mr. Kaplan: I object, if your Honor please.

The Court: Objection sustained. Strike out the answer. Don't lead the witness, Mr. Davenport.

Q. Would it be correct that the way, the best way to get out would have been to move directly to your left and go this way?

The Court: Right, that would have been easier.

(Repeating inaudible answer of witness.)

A. Right that would have been easier.

Q. Easier than going this way? A. Right.

Q. Is it correct that the reason you could not go directly to your left is that the man in your left moved in a position that stopped you and made you go this way to get out, is that correct? A. Yes.

Alberto Greene—for People—Re-Cross

The Court: In other words, you had to go around him to get out?

Witness: Yes, sir.

Examination by Mr. Kaplan:

Q. Mr. Greene, it was just a matter of making one step, wasn't it? A. I don't know exactly what you mean.

Q. It happened so fast that you don't know, is that right? A. Right.

The Court: But you did have to go into the basketball court?

Witness: Yes. I could not run in a straight line to the exit.

The Court: And the path was straight?

Witness: The fastest way for me to get away from them would be straight down that wall and out.

Q. Well, let me ask you, you say you went through the basketball path. There is another way to go out, up the steps? A. That was the way I was going originally.

Q. But the fellow standing up at the steps on your way going up the steps was the fellow with the gun, wasn't he? A. No. There was a fellow on my right which was the fellow with the knife.

Q. He was the one between you and the steps up the other way, isn't that right? A. Right.

Q. So you were frightened naturally, so you went out the other way where the fellow was standing without anything, is that right? A. Yes.

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DET. PHILIP IANNUCCILLI, Shield No. 3001, 11th Robbery Squad, having duly sworn, testified as follows:

Examination by Mr. Davenport:

Q. Detective, how long have you been a member of the New York City police department? A. Approximately sixteen and a half years.

Q. How long have you been a detective? A. Since 1968, March, 1968.

Q. Detective, in August of 1971 where were you assigned? A. 71st Squad.

Q. Were you on duty on August 13, 1971? A. Yes, I was.

Q. When did your duty commence on that day? A. On the 12th at five p.m., and it was to end on the 13th at eight p.m.

Q. Detective, during the course of that tour of duty, did you, in the vernacular, "catch a case"? A. Yes, I did.

Q. What does that mean, "catch a case"? A. It depends on how many partners you are working with. We split up the tour of duty equally, and whatever happens during your portion of that time, is your case, you catch the "squeal," you handle the investigation.

Q. And you caught a case? A. Yes, I did.

Q. What was the matter that you caught? A. It was a homicide of one Germain Phillips.

Q. Where did it occur? A. In the seven one precinct in a park called "Lincoln Terrace Park."

Q. Detective, did you conduct an investigation? A. Yes, I did.

Q. Did there come a time that you made an arrest in this case? A. Yes, I did.

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Q. Who did you arrest? A. On August 14, 1971 I arrested one Glen Darian. On August of 1971 I arrested one Rudolph Mills. On May 31st, 1972 I arrested Paul Robinson.

Q. Did there come a time that Mills and Darian or Darian and Mills went to trial? A. That's correct.

Q. Did there come a time that that trial reached a conclusion and a verdict was reached? A. Yes.

Q. What was that verdict? A. They were both convicted.

Q. Of murder? A. Of murder.

Q. Detective, did that close the case as far as you were concerned? A. No, sir.

Q. As a matter of fact, did your arresting Mills and Darian, did that close the case as far as you were concerned? A. No.

Mr. Kaplan: I object.

The Court: I will allow it.

Q. Detective, what did you do after the conviction of Darian and Mills? A. I continued the investigation.

Q. You believed them to be innocent, is that correct?

Mr. Kaplan: Objection.

The Court: Sustained. Strike out the answer.

(Witness had said, "Yes.")

Q. Detective, did there come a time that you had contact with the person that you say you arrested, Paul Robinson?

A. Yes.

Q. What was the first time you had contacted him? A. On August 19, 1971.

Q. Did you ask him what he knew? A. Yes.

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Q. Did he tell you what he knew? A. He said he had no knowledge of the crime.

Q. Did you speak to him again? A. Yes, I did.

Q. When was that? A. I spoke to him on many occasions after that. I don't remember the exact dates and times.

Q. Did there come a time that you asked him to go some place, Detective? A. That's correct.

Q. Where did you ask him to come? A. On May 31st, 1972 was the date that the defendants Mills and Darian were to be sentenced in the Supreme Court here. I had asked Paul Robinson if he would meet me in the Supreme Court Building in Brooklyn, here in Kings County on the 9th floor.

Q. Detective, you say you had spoken to Robinson on numerous occasions, presumably about this case, is that correct? A. Correct.

Q. And you had asked him what he knew about this case? A. That's correct.

Q. Did he ever tell you anything prior to the time you asked him to come here on the day of sentencing of Darian and Mills? A. No, sir.

Q. Tell us what happened on the day that you got here on that day of sentence. A. Let me make one correction. At one time prior to the day that he was arrested, he had given me some information pertaining to Gargo and he had stated it was a few months before, the exact date I don't recall, at his home. I believe it was. He stated that the party known as Gargo, who I believed was one of the three people involved, was dead, and he stated the only reason he was telling me that at that time was because it didn't make any difference any more.

Q. You believed one Gargo was involved in this? A. That is correct.

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Q. When did you first begin to believe that Gargo was involved in this? A. Shortly after the arrest of Darian and Mills.

Q. Did another name come in to your inquiry or investigation? A. That is correct, Georgie (phonetic).

Q. Now, tell us about the day Darian and Mills were to be sentenced. A. I asked the defendant, Robinson, if he would meet me in Court here, and after a lengthy conversation on the telephone on that morning, he agreed to meet me here, which he did on the ninth floor of the Supreme Court. We had a conversation at the far end of the hall where we were seated on a bench, and I asked him—he said --I had showed him some photos which I wanted him to identify. I had a morgue photo of Gargo which I wanted him to identify as being Gargo. And I had a photograph of one Glenford Jackson who I believed was Georgie. And I wanted him to identify that photo. And I had these photos mixed among a group of others and we talked as I showed him the photos. And he started asking me a number of questions such as, what would happen to the two boys. And I told him that they were to be sentenced. And he asked how much time would they do. And I told him, possibly they could do as much as 25 to life. He asked what could help them. And I told him at this point, I started giving him suppositions, if the third person who was involved here would come forth. And we talked and this line of conversation went on and suddenly his voice broke and he started to cry a little. And he stated that, he showed me the photo, the morgue photo, and stated this was Gargo. And he showed me Glenford Jackson's photo and stated, this was Georgie. And he said that these two boys were guilty and Darian and Mills were innocent, that he was with Georgie and Gargo on the night of the homicide, stated that Georgie had the

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gun, he had done the shooting. Gargo had a knife. And he had stated that he had left the house on Rogers Avenue and was on his way home when he met the two boys.

They went into Lincoln Terrace Park. [They were looking for a prostitute and a pimp.] And in the park they met the boy and girl, Germain Phillips and Albert Greene. And he said that Georgie, if I recall—

Mr. Davenport: He said that they went looking for a prostitute and a pimp.

Q. Did you ask him why they were looking for a prostitute and a pimp? A. Not at this point. He then stated that if I recall, that he didn't remember the exact words, but Georgia had asked the boy to empty his pockets or, "Give me everything you have." And the boy had reached for his own pocket. And at this point, Georgia had fired the gun. And this is where the girl got shot. At that point, I advised him of his rights and I asked him if he would come with me to the District Attorney's office across the street and make the statement there. And he agreed that he would. En route to the District Attorney's office, we continued the conversation and I asked him—

Q. Just for clarification, as you come out of this building, where is the District Attorney's office? A. It's approximately one city block from here. It's in the Municipal Building across the street.

Q. You turn left— A. Turn left, walk down a path across the street.

Q. And then across the street into the large building? A. That's correct.

Q. And you did that and took that walk? A. That's correct. En route to the District Attorney's office, we con-

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tinued the conversation and I asked if, now that he was advised of his rights, if he wouldn't mind continuing. And he told me that he still wasn't sure at this point as to whether or not he trusted me. But he would continue talking with me. And he again related the story. And as he was talking he mentioned again that they were looking for a prostitute and a pimp. And I asked him at that point why? And his answer was to take them off. We then spoke about the shooting.

Mr. Kaplan: Judge, may I object. When he said he advised them of his rights, may I just have a voir dire on that?

The Court: Okay.

Mr. Davenport: May I approach the Bench?

Voir Dire Examination by Mr. Kaplan:

Q. Detective Iannuccilli, would you be good enough to tell me what rights you say you advised the defendant of when you were walking over to the District Attorney's office. A. I advised him of his rights on the 9th floor.

Q. Tell me what rights.

The Court: Tell him what you said to him.

A. I told him that he had the right to remain silent, refuse to answer any questions, that anything he said could be used against him in a court of law. You have the right to consult an attorney before speaking to the police, to have an attorney present during any of the questioning now or in the future. If he couldn't find an attorney, one would be provided for him without cost. And if he did not have an attorney available. You have the right to remain silent—until he had an opportunity to consult with one. And I

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asked him if he would be willing, now that he was advised of his rights, to make a statement. And he said he would.

Q. Are you reading from something? A. Yes, sir, I am reading from a rights form. And I would like to continue answering the question, if I may.

Q. Is that the form you read from? A. No, sir, I did not read from a form. I gave it to him from memory. And it was done in the presence of an attorney, Mr. Lombardo. And when I finished giving him his rights, I had asked Mr. Lombardo, "Did I leave anything out?"

Q. But Mr. Lombardo is not the defendant's attorney. Was he Rudolph Mill's attorney or Darian, do you remember? A. I don't remember which.

Q. But he was the attorney of one of those two defendants? A. Correct.

Q. Officer, just tell us the rights that you advised him without reading from that? A. I told him that he had the right to remain silent. And he had the right to counsel now or at any time during any of the proceedings, that if he could not afford counsel, the Court would provide counsel for him.

Q. What else? A. I asked him if he would be willing to make a statement.

The Court: Mr. Kaplan is asking you to give him the rights that you say you gave him from memory.

Witness: I don't remember the exact words that I had given him.

Q. Not the exact words, anything that you would tell a person that you placed under arrest or investigating. What rights would you tell him? A. (No response.)

Q. For instance, what rights would you tell me? A. He has a right to counsel. If he can't afford counsel, counsel

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will be provided for him. Anything he says will be used against him in a court of law. If he couldn't afford counsel, counsel would be provided by the courts.

Voir Dire Examination by Mr. Davenport:

Q. Tell us what happened? A. We were en route to the District Attorney's office with the defendant, Robinson. And I asked if he would continue the conversation now that he was advised of his rights. He stated that he would, but he still wasn't sure whether or not he trusted me at this point. As we walked, he again reiterated the story. He mentioned they were looking for a prostitute and a pimp. And I asked him at that point. "Yes," he stated they were, "going to take them off." He then mentioned that when the girl, when Georgie had fired the gun, the gun had misfired first, and when the girl screamed, he said that he knew that this was a scream of pain, that it wasn't a scream of right. He knew that she had been shot. He again stated how the boy had reached for his pocket and they didn't know whether he was reaching for a weapon, and this was why Georgie had fired the gun. We then went to the District Attorney's office where a statement was taken by the District Attorney there.

Q. Did he mention anything about where he went after this event occurred? Did he tell you anything about that? A. To the best of my recollection, I believe he stated that he had gone back to the house, if I recall, I am not positive though, on Rogers Avenue.

Q. Do you know who lived at Rogers Avenue? A. This was a house used—I don't know who actually rented the apartment, it was an apartment, and it was used by a group that he belonged to, he was friendly with.

Q. Mostly from Jamaica, is that correct? A. Right.

Philip Iannuccilli—for People—Cross

Q. Jamaica, West Indies? A. Right.

Q. I hate to ask this question. Can I approach? I want to get a ruling before I ask him the question.

(Short conference before the Bench.)

The Court: No further questions.

Cross Examination by Mr. Kaplan:

Q. Detective Iannuccelli, at the time that you arrested Darian and Mills you had a conversation with Alberto Greene, didn't you? A. Yes, sir.

Q. By the way, did you testify before the Grand Jury in connection with this case? A. Yes, sir.

Mr. Kaplan: May I have that testimony, please?

Mr. Davenport: Do you want this to be deemed marked as People's One for identification?

Mr. Kaplan: I will examine it later, Judge.

Q. Before you arrested Darian and Mills, did you have pictures of Darian and Mills and show them to Greene? A. He picked Darian's picture from a photo.

Q. And Mills? A. No, sir.

Q. At that time did you have pictures of George and Gargo? A. No, sir.

Q. When for the first time did you get pictures of George and Gargo? A. Sometime in 1972, after the two boys had been convicted.

Q. Would you show, did you ever show those pictures to Alberto Greene? A. Yes, I did.

Q. Could he identify George and Gargo? A. No, sir.

Q. But you ascertained that the defendant—I believe

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you testified—was present, isn't that right? A. Excuse me, sir.

Q. You ascertained that on the night of August 13, 1971 or the early morning, the defendant was present in the Park when this incident took place. A. Referring to Robinson?

Q. Yes, the defendant. A. Yes, sir, by his own admission he was there.

Q. I beg your pardon? A. By his own admission he was there.

Q. No, before you arrested him you ascertained he was present in the park, didn't you? A. I believed he was there.

Q. This is what you thought? A. Right.

Q. Had you ever been told that he had been present in the park, by anybody? A. Yes, sir.

Q. So then you conducted your investigation along those lines, is that right? A. That's correct.

Q. Now, before you arrested the defendant, you went around. Did you ever go around to his house and talk to him? A. Yes, I did.

Q. Did you ever talk to his mother? A. Yes, I did.

Q. And did you ascertain that at one time that the defendant had a cast on his leg? A. Yes, I did.

Q. Did you have a conversation with him about that? A. Yes, sir.

Q. And as a result of that conversation, did you find out what happened to it?

Mr. Davenport: Your Honor, I object to testimony about a cast on a leg sometime after this event. I don't see the relevance.

The Court: I don't know, all I know is that the question is, did he have a cast on his leg. I haven't learned yet whether he had the cast on his leg.

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Q. When did you find whether—did you say that the defendant had a cast on his leg? A. I believe it was in the early part of 1972.

Q. Did you ask him what happened?

Mr. Davenport: Your Honor, now I will object.
The Court: Overruled.

*Q. What did he say to you and what did you say to him?
A. He stated to me that—

Q. Excuse me, officer, you are bending down, which is perfectly okay, but if you are using notes to refresh your recollection, I would like to know that. Fine, that's all I want to know.

(At this time the detective placed a pile of papers on the judge's desk.) (Bound in groups.)

Mr. Davenport: I take it by that, detective, you were not?

Witness: I was not. They were closed.

(At this time a different witness was called out of order, Dr. DiMaio.) (After Dr. DiMaio was finished, the reporter read back the last question, and the examination continued.) (See question with * above.)

Q. The conversation about the leg? A. Yes, sir.

Q. What did you say to him and what did he say to you?

A. I asked him what happened to his leg. His leg was in a cast. And he stated he was shot.

Q. Did you ask him if he knew who shot him? A. Yes, I did.

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Q. What did he say? A. He stated that he wouldn't tell me anything about it, that in his own time and way he would take care of things himself.

Q. Did he tell you he was a friend of Gargo's? A. No, sir.

Q. He never told you anything about that? A. No, sir.

Q. Did you ask him anything about that? A. I told you what I had asked him. I told him that I would do what I could to help him if he told, if he would give me some information. And he said he would take care of it in his own time and in his own way.

Q. Did you have any other conversations with respect to that concerning the defendant before the conversation took place, at any time with this defendant? A. Yes.

Q. Before the conversation took place in the hall with this defendant? A. Yes.

Q. Now, Mr. Lombardo represented one of the defendants in the Darian and Mills case? A. That is correct.

Q. Is that correct, I think he represented Mills, didn't he? A. I don't recall which one.

Q. And Mr. Lombardo was interested in the outcome of your conversation?

Mr. Davenport: Objection.

Mr. Kaplan: I will withdraw that.

Q. Mr. Lombardo was outside there? A. That's correct.

Q. Do you know who the assistant district attorney was? Who was the assistant district attorney at the time of that trial? A. It was Mr. Davenport.

Q. Of Darian and Mills?

Mr. Davenport: For the record, it was a Mr. Agulnick.

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A. It was, the original trial was Mr. Agulnick.

Q. When you had the conversation with the defendant, Paul Robinson, you said Mr. Lombardo was present. Do you remember the conversation that you had with Robinson?

A. Yes, sir.

Q. Just repeat it for me. A. I showed him some photographs which I wanted him to identify. He had the photographs in his hand. And he started asking me questions. He asked me about the two boys. He asked me what would happen to them.

The Court: Darian and Mills.

Witness: Darian and Mills, Yes, sir. And what was needed to help. And then I started giving him suppositions and at this point his voice cracked. He started to cry a little and he took the photos of Glenford Jackson and stated this was Georgie. The morgue photo that I had, he stated that was Gargo. And he stated that Darian and Mills were not present at the time of the homicide, that they were innocent and that Gargo and Georgie were there with him.

Q. What did Robinson say that he did? A. What did he say he did?

Q. Yes, at that time. A. He stated that he was in the park with them. He stated that Georgia had a gun. Gargo had a knife.

Q. Did he tell you whether or not he knew Georgie had a gun when they went into the park? A. He stated to me that, he said, no, he had no knowledge that Georgie had a weapon. And he stated that he had no knowledge of the crime before it occurred.

Philip Iannuccilli—for People—Cross

Q. He had no knowledge of what? A. He said he had no knowledge that the crime was going to occur. He stated he knew nothing about the crime until it happened. And he had no weapon.

Q. And did he tell you that he had no knowledge of the fact that the other individual had a knife, did he tell you that, too? A. No, sir. He didn't know that Georgie had a gun.

The Court: And he did not know that Gargo had a knife?

Witness: If I said that, I am sorry. He mentioned the gun, that he didn't know Georgie had the gun, but we never elaborated on the knife. He did say that Gargo had the knife and Georgie had the gun.

Q. Do you remember testifying before Grand Jury on September 14, 1972 in connection with this case? A. Yes, sir.

Q. And do you remember being asked certain questions and giving certain answers? A. I would have to see them.

Q. Did you remember being asked? A. Yes.

Q. You were asked certain questions by the assistant district attorney who was Gerard Lynch. Do you remember being asked this question and giving this answer:

"Question: What did Mr. Robinson say, if anything, about the incident himself whether or not weapons were involved? Answer: He stated that Georgie had a gun and Gargo had a knife."

Do you remember being asked that question and giving that answer? A. Yes, sir.

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Q. Now, do you remember being asked this question and giving this answer:

"Question: When was the first time he realized this?
Answer : When they were pulled out during the attempted robbery."

Do you remember being asked that question and giving that answer? A. I don't remember, but if it's there, I said it.

The Court: Your testimony is that he told you he did not know that Georgie had a gun?

Witness: Yes, sir.

The Court: Whether he ~~had~~ Gargo had a knife or not, you don't know?

Witness: Right.

The Court: Does that refresh your recollection?

Q. Does this refresh your recollection that he didn't realize that the other fellow had a knife? A. I don't recall. At this point, I don't recall that.

Q. But if this is what you testified to— A. Yes.

Q. After Robinson made a statement to you outside in the corridor here, you proceeded to walk over to the District Attorney's office through the park? A. Yes, sir.

Q. And do you remember who went along with you?
A. There was myself, the defendant Robinson, there was a brother officer and I don't remember anybody else.

Q. Do you remember whether or not Mr. Lombardo went along with you? A. I don't recall.

Q. Do you remember whether Mr. Agulnick went along?
A. (No response.)

Q. Did you tell Mr. Agulnick where you were—he was the assistant district attorney? A. Yes, I did.

Philip Iannuccilli—for People—Cross

Q. Did you tell Mr. Lombardo where you were going?
A. Mr. Lombardo was present in the D A's office, and so was Mr. Agulnick. Whether he came with me, I don't recall.

Q. Then, just to clarify the situation, by the time you then reached the District Attorney's office with Robinson, Mr. Agulnick and Mr. Lombardo were also there with you, is that right? A. They were there. I don't know whether they were there before me or after me.

Q. But you were all there? A. Yes, sir.

Q. Now, walking through the park, did you have another conversation with Robinson? A. Yes, I did.

Q. What did he say to you and what did you say to him?
A. I asked him if he wouldn't mind talking to me, now that he was advised of his rights. And he stated that he still wasn't sure whether or not he trusted me, but he would.

Q. And what did he say? A. He repeated the incident and when he mentioned the part about they were looking for a prostitute and pimp, I asked him at that point, "Why?" And he stated, "To take them off."

Q. And this is the first time you heard about that statement? A. Yes, sir.

Q. That he used the words, "Take them off." Do you want to tell the jury what that means? A. That means to rob someone.

Q. Now, when you reached the District Attorney's office with Robinson, and you said Mr. Lombardo was there, and Mr. Agulnick, did you tell Mr. Agulnick, the assistant district attorney, what Robinson had just told you, that he knew that they were going to take somebody off? A. I don't recall any conversation with him.

Q. You didn't tell Mr. Agulnick? A. I may have. I don't recall.

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Q. Did you tell Mr. Lombardo? A. No. I don't recall telling Mr. Lombardo anything.

Q. Do you know who the assistant district attorney was—withdraw that—When you took Robinson to the assistant district attorney's office, did someone tell you that they were going to take a statement from him? A. Yes, sir.

Q. Do you know who the assistant district attorney was? A. I don't recall.

Q. Was there an assistant district attorney present? A. Yes, sir.

Q. Did you tell him of the conversation that you had with Robinson walking through the park? A. I spoke to the D.A. I don't recall what conversation.

Q. Were you present when Robinson gave a statement to the assistant district attorney? A. Yes, I was.

Q. Did you listen to the statement? A. Yes, I did.

Q. At any time during the questioning of Robinson, did you question Robinson? A. I don't recall, sir. I don't believe so.

Q. At any time during the questioning of Robinson, did you tell the ADA, or rather did you suggest any questions to the assistant district attorney? A. I don't recall, but I don't believe so.

Q. You are testifying that you received, you had a conversation and an admission with Robinson, that he was present and that conversation took place outside the courtroom here in the corridor, right? A. That's correct.

Q. But during that time he knew nothing of what was going to take place? A. Correct.

Q. Then you say you walked with Robinson over to the District Attorney's office, and now he changed his story and said he knew what was going to take place? A. I told the words he used, sir.

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Mr. Davenport: Can I object to the characterization, your Honor, of "changed"?

The Court: Well, that's the testimony of the witness, that they were in the park, they were going to take off, in other words, to rob a pimp and a prostitute. Is that right?

Witness: Yes, sir.

Q. Then we have a written statement now that was taken by the assistant district attorney's office and transcribed. And by the way, do you have any notes in connection with this case? A. Yes, I do.

Q. Do you have them present? A. Yes, I do.

Q. Do you need them to refresh your recollection? A. I may. Up to this point I haven't.

Q. Now, this was transcribed? A. Yes, sir.

Q. And you were present during all that time? A. Yes, sir.

Q. And you heard him make a statement, is that right? A. Yes, sir.

Q. I want you to look through the statement made by Paul Robinson.

Mr. Davenport: Your Honor, I object to this. The assistant is outside who took that statement. And he is going to testify. I don't know why we have to do this.

The Court: I assume that Mr. Kaplan wants to know if there is anything in that statement about taking off a pimp and a prostitute.

Mr. Davenport: Okay, I will stipulate that it doesn't say that.

The Court: And Mr. Kaplan: the district attorney is outside—the reporter is.

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Mr. Davenport: The assistant is outside.

The Court: I assume the statement will speak for itself.

Mr. Kaplan: As long as Mr. Davenport will stipulate on the record that there is nothing in here to show—

Mr. Davenport: More than that, I am going to call the assistant and we will put the whole statement on.

Q. Do you remember Mr. Agulnick, where he was when this statement was taken? A. I don't recall.

Q. When I say, "Mr. Agulnick," he was the ADA who was prosecuting Darian and Mills or who had prosecuted them? A. Right.

Q. Do you know where Mr. Lombardo?

The Court: Let's get the record straight. The trial, I assume, which was with Darian and Mills took place sometime before May 31st, is that right?

Witness: Yes, sir.

The Court: May 31st was to have been the sentence date, is that right?

Witness: Yes, sir.

The Court: And whether or not Mr. Agulnick was engaged then or not, he was at least a month after the trial, is that right?

Witness: Yes, sir.

The Court: And Mr. Lombardo, of course, representing one of the defendants was present for sentence?

Mr. Kaplan: Yes. I just want to, if I may, if your Honor pleases.

Philip Iannuccilli—for People—Redirect

Q. But you knew that Mr. Agulnick had prosecuted the case against Darian and Mills? A. Yes, sir.

Mr. Davenport: I am going to object. Detective Iannuccilli is not responsible for knowing the intricacies of our office.

The Court: He was a witness in the case.

Mr. Davenport: But he is going to ask him why Mr. Agulnick wasn't there.

The Court: Let's wait. I will rule on each question as it is put. Let's not anticipate.

Q. Detective Iannuccilli, you knew that Mr. Agulnick had prosecuted the Darian Mills case? A. Yes, sir.

Q. And you did testify that you saw Mr. Agulnick in the District Attorney's office at the time the statement was taken from the defendant, Robinson? A. To the best of my recollection.

The Court: You saw him in the office. Is his name listed? (Referring to the Statement.)

Mr. Davenport: No, it is not. He was not there.

Examination by Mr. Davenport:

Q. To your knowledge, are the assistants in the homicide unit, do they work outside of those offices? A. Yes, sir.

Q. So that the fact that Mr. Agulnick was there in that office does not mean that he was there because Robinson or anybody else was coming over to talk, is that right? A. No, sir. This is where they work out of.

(Followed by colloquy and testimony of Ada Zsuffa.)

(At 12:55 p.m., the jury leaves the courtroom.)

Colloquy

The Court: You indicated to me that you have the birth certificate for Rudolph Mills who was born in Jamaica?

Mr. Kaplan: Yes, with a mother by the name of Ieilda Pinnock.

The Court: What probative value does that have except the testimony of this witness that he lived in Jamaica for three years, as far as he knows?

Mr. Kaplan: It may very well have some probative value, your Honor.

The Court: If you will tell me, please.

Mr. Mills is excused.

(At this time Rudolph Mills leaves the courtroom.)

The Court: What is the purpose of this?

Mr. Kaplan: I want to make an offer of proof to the Court to show that that person is not a reliable witness, it is to attack his credibility. Number two, Judge, as a witness in the case, I was going to ask if your Honor would permit me to ask him whether or not he was a fugitive from Justice in the Island of Jamaica, arrested for the crime of rape, and never attended Court. I have dates.

If your Honor would permit me to ask those questions, then I think that this would have some probative value tied in together.

The Court: I will tell you this: A fugitive from Justice says, "no." You are bound by the answer.

Mr. Kaplan: I understand.

The Court: I will permit you.

Mr. Kaplan: That's the reason I want to tie it all in.

Colloquy

The Court: If he committed a rape, if he denies this in the absence of a conviction—

Mr. Kaplan: I understand.

The Court: And it is just a question of the identity of a person. But how are you going to prove that a person by his name is wanted for rape, except by his testimony?

Mr. Kaplan: I don't know, Judge. I may be able to.

The Court: But the mere fact that he was accused of rape does not mean he was guilty. The fact that Rudolph Mills, even assuming it was this Rudolph Mills who was accused of rape in Jamaica, and was never prosecuted, is no proof of guilt, any more than if he had been arrested for rape, here. And there would be no proof of guilt. And flight in and of itself proves very little, as a matter of law.

He could come to the Mainland or the United States for the purpose of improving his life and not for avoiding prosecution. I will permit you to ask for any immoral act. But I don't think that the record should be cluttered up by information as to whether he was born in Jamaica or whether he wasn't born in Jamaica.

The Court will note for the jury that he has a pronounced West Indian accent as distinguished from a Southern accent. I think that that speaks for itself. Whether one could acquire such an accent in a three-year sojourn in the British West Indies would be something for the jury to determine.

Of course, it is also possible that his mother was a West Indian, a Jamaican, and that was the language that he learned at home. This would be just

Colloquy

the same as we have some of our southern people living in New York who were born perhaps in New York of southern parents and have southern accents. How many of our foreign born, native born with foreign parents, speak with foreign accents? I don't know what it would prove. All we have in the case is that there was a house on Rogers Avenue where Jamaicans congregate. I don't know how that goes to the innocence or guilt of the defendant. I don't want to curtail your cross examination.

Mr. Kaplan: Would your Honor permit me to introduce this into evidence for whatever it is worth, the birth certificate?

The Court: For what purpose?

Mr. Kaplan: To attack his credibility, if your Honor pleases, then I am going to—

The Court: I think I have even mentioned that nobody knows where he was born. For that reason we have exceptions to the hearsay rule, pedigree statements may be received in evidence because nobody really knows when or where he was born. All he knows is what somebody told him.

Mr. Kaplan: I would just want to show that he has a motive for lying. I think that maybe I might be able to establish it.

The Court: All right, if you can establish a motive for lying, but the mere fact that he might have been born in Jamaica is no proof that he is lying. His testimony is—and you may explore if you want—that as far as he knows, he was born in the South because from the earliest time that he can remember, he was living in the South. That is his testimony.

Colloquy

Mr. Davenport: Judge, isn't that a collateral matter where he was born? And is that something that you can prove by other evidence?

The Court: That is collateral. It is still collateral.

Mr. Kaplan: Judge, may Mr. Brady say something to the Court?

The Court: Yes. What is your name?

Mr. Brady: Harold B. Brady, 44 Court Street, Brooklyn, New York. And I don't know if this should go on the record or not.

The Court: This is an offer of proof, Mr. Brady.

Mr. Brady: I went to Jamaica because I had a criminal investigation. I have with me this document which proves there is a fingerprint of one Rudolph Mills who was wanted in Jamaica for the crime of rape. I spoke to the Superintendent of the downtown Danentown place, who also knows me, and I spoke to a Policeman named Olsten McLeash, who was an Officer who knows this defendant from early childhood. I spoke to another one.

The Court: All right, Mr. Brady.

Mr. Brady: In other words, what I am really going to say, Judge, what I am going to say is that I spoke to the Commissioner, the Deputy Commissioner who says, if he gets a letter from the Court—

The Court: Please, I am satisfied. And I told Mr. Kaplan that he may ask the question when he committed a rape in Jamaica, or whether he did not. And I am satisfied that Mr. Kaplan will be asking that question in good faith.

Mr. Brady: Can he ask the question, "is he wanted in Jamaica, was a warrant issued from the Chief Magistrate's Court?"

Colloquy

The Court: I will not permit that any more than assuming he had been arrested in Jamaica. The fact that he is wanted is no more cogent proof than if he has been arrested, that he committed a crime.

Mr. Brady: I understand the legal position, sir. But the difficulty on the part of the defense is that—

The Court: Please, Mr. Brady, just what you and Mr. Kaplan want me to do is to permit proof that he has been arrested in Jamaica or he has been charged with a crime in Jamaica, and you may not do that. You may not do that any more than you could prove that he had been arrested in New York for rape. He has not been convicted of rape. You may ask him, but you are going to be bound by his answer. And I am not going to let you prove indirectly what you cannot do directly.

Mr. Kaplan: Judge, could we ask him the question of whether or not he had been arrested for a rape at such and such a place and such and such a date?

The Court: You may not ask about an arrest. You may ask about whether he committed the act which he is accused of.

Mr. Kaplan: Can I then ask him whether or not he ever appeared in Court for this act?

The Court: No. His appearance in Court or his lack of appearance is no proof of anything. Apparently, the case was never disposed of, so he was not convicted. That's what I am trying to separate, I am trying to separate the chaff from the wheat.

Mr. Kaplan: There is a warrant out for him.

The Court: That may well be, but that's no proof of guilt.

Rudolph Mills—for People—Direct

Mr. Brady: I will tell you off the record.

Mr. Davenport: I don't think the Judge should hear this character assassination here. I am not raising him up as a saint, but I don't think he should be allowed to stand here.

The Court: It is just a question of proof which I have ruled on.

Mr. Davenport: Not that I think your mind would be poisoned.

The Court: It isn't my mind, it is a question of whether the jury's mind, whether it is admissible or inadmissible evidence.

RUDOLPH MILLS, 312 Jefferson Avenue, having been duly sworn,, testified as follows:

Examination by Mr. Davenport:

Q. Mr. Mills, how long have you lived here in Brooklyn?

A. For about before I been arrested it was about eight or nine months.

Q. And prior to that, where did you live? A. In the South. In North Carolina.

Q. Did you live in Jamaica at sometime? A. Yes.

Q. How long did you live in Jamaica? A. For three years.

Q. And when you came from Jamaica, where did you come to first? A. (No response.)

Q. Here or in the South? A. To the South.

Q. And then you came up here? A. Yes.

Q. Prior to your being arrested, Mr. Mills, where did you live? A. Jefferson Avenue, 312 Jefferson Avenue.

Rudolph Mills—for People—Direct

Q. Did you ever have occasion to stay at an address at Rogers Avenue? A. Yes. That's where my stepmother's son was living at.

Q. What was the address of Rogers Avenue? A. 104.

Q. And would you occasionally stay there? A. Yes, sometime.

Q. And would there be other young men from Jamaica who would also stay in that apartment? A. Yes.

Q. I want to direct your attention to the day that you were arrested, that was August 14—no— Do you recall the day you were arrested? A. Yes.

Q. What day was it? A. It was the sixteenth.

Q. Of August A. Yes.

Q. And they charged you with a crime, is that right? A. Yes.

Q. And they told you what day that crime occurred, is that right? A. Yes.

Q. I want to direct your attention to that day, to the evening of August 12, after midnight, August 13. Would you tell me where you were that evening? A. I was at 104 Rogers Avenue.

Q. At the beginning of the time about 8 o'clock, who else was there? A. Eight o'clock?

Q. Or nine o'clock, some time late. A. About ten o'clock I reached 104 Rogers Avenue.

Q. What? A. It was about ten o'clock when I arrived at 104 Rogers Avenue.

Q. When you arrived there, who was there? A. It was a couple of guys, I don't know, about four or five dudes in the house. I don't know their sir names, but I can give you names.

Q. Do that. A. It was Charles Wes, Barick (phonetic) and one Rufus. Yes.

Rudolph Mills—for People—Direct

Q. Did there come a time that some other people came?

A. Yeah.

Q. Who came after you had arrived? A. Gargo and Josh (phonetic) at about 10:30. Then came Paul about eleven o'clock.

Q. Do you see Paul Robinson here in this courtroom?

A. Yes.

Q. Would you point him out for us, please? A. Yes.

Mr. Davenport: Indicating the defendant.

Q. Did there come a time that you heard some conversation involving George and Gargo and Paul? A. Yes.

Q. Would you tell this jury and this Court what you heard? A. Paul and Gargo was having a conversation about going to look some money before they left the house. I was cooking and I asked,—if you needed something, before they went out. Somebody, I don't really know who, was it, say, "We can wait. We are urgently in need of some money." So they left.

Q. Did Paul say something to you before he left? A. Yes, he told me George had a gun.

Q. And there came a time that they left that apartment at 104 Rogers Avenue together? A. Yes.

Q. Did there come a time that they returned to that apartment? A. Yes.

Q. Would you tell us when they returned? A. About two o'clock.

Q. Could you tell us, described to us what happened when they returned? A. I went to the door and I saw all three of them came in. They were breathing, sweating hard, so I said, "What happened?" So I let them inside the apartment. Paul started to tell me. Then finally all three of them ended up telling me what happened.

Rudolph Mills—for People—Direct

Q. What did Paul say? A. He said they to the park to look some money. They saw this dude and a girl. So George said to the dude, "Empty your pocket." The dude say in return, "You got to kill me to get mine," or something like that. Then he dipped in his pocket and started backing away. So George didn't know what was the dude's intention by putting his hands in his pocket, so he started firing shots. Finally they heard somebody scream and they ran.

Q. And then they arrived at the address of 104 Rogers Avenue? A. Yes.

Q. Now, Rudolph, there came a time that you were tried? A. Yes.

Q. Is that right? A. Yes.

Q. Did you testify in that trial? A. No.

Q. What was the answer?

The Court: The answer is no.

A. Nothing pertaining to what I just said.

Q. And you were found guilty, is that right, Rudolph?

A. Yes.

Q. There came a time that the district attorney of this county came into court and you made a motion to vacate that conviction, is that right? A. Yes.

Q. And then there came a time that I spoke to you, is that right? A. Yes.

Q. And I spoke to you after the District Attorney had vacated your conviction? A. Yes.

Q. And I asked you to tell me what happened, is that right? A. Yes.

Q. And I asked you if you would testify? A. Yes.

Q. Against Paul Robinson. A. Yes.

Q. And you agreed? A. Yes.

Rudolph Mills—for People—Cross

Examination by Mr. Kaplan:

Q. Mr. Mills, did you testify before the Grand Jury in connection with this case, Paul Robinson's case?

Mr. Davenport: No, he didn't.

Mr. Kaplan: I would accept the representation of Mr. Davenport that he didn't testify.

Q. Just, did you say you testified? A. (There was no response.)

Q. In your first case, Mr. Mills, in the case where you were convicted, did you testify in that case? A. Yeah, I been on the stand, but nothing pertaining to what I have said just now was said.

Q. Had you ever told anybody, before you testified in your trial, about what you are telling us today? A. Yes.

Q. Who did you tell? A. I told the D A at the time when I was arrested. And the detective.

Q. You told the D A and you told the detective. Who was your lawyer? A. At that time it was Mr. Lombardo.

Q. Did you tell Mr. Lombardo? A. Yes.

Q. Were any questions asked of you by Mr. Lombardo during your trial or the assistant district attorney, to the best of your knowledge, concerning anybody else except you and Darian?

Mr. Davenport: Your Honor, I am going to object to that. That places a burden on Mr. Lombardo, the effect of which Mr. Mills would not be responsible for, or the assistant district attorney.

The Court: I will permit the witness to answer yes or no. As Mr. Kaplan knows and you know,

Rudolph Mills—for People—Cross

some questions are not asked. Some questions are asked, others are not asked, gentlemen.

Q. Questions were asked of you by anybody as far as you can remember concerning anybody else participating in that crime, is that right? (Meaning, "Were questions asked?"

Mr. Davenport: I object to that question. His answer is that questionss were asked by Detective Iannuccilli and by the ADA.

The Court: This was not during the course of the—

Mr. Davenport: I am objecting because it it is not Mr. Mills fault because nobody asked him that question.

The Court: I am going to clarify it. This defendant is on trial, having been accused of having committed a crime in the park. He testified that he was not in the park. Is that right?

Mr. Kaplan: He testifies he was not in park.

The Court: And that was the issue in that case: Was he in the park or was he not. If he were to be asked whether he had heard anything that happened in the park it would be all hearsay.

Mr. Davenport: Very well, Judge. It would be inadmissible.

Q. Mr. Mills, where were you born? A. In North Carolina.

Q. What's your mother's name? A. Isa Lou Pinnock. (Phoentic. Mother's name is Ieilda Pinnock reporter was told.)

Rudolph Mills—for People—Cross

Q. Did she ever live at Four Grade Lane in Kingston, Jamaica? A. I don't remember. I wasn't told by my parents that I was born in the South.

Q. I don't understand, you weren't told?

Mr. Davenport: Your Honor, I am going to object. I don't see the relevancy to where Mr. Mills was born, where he lived, whether he lived in Kingston, Jamaica.

The Court: It's credibility, but Mr. Kaplan, I will observe you don't know where you were born except what you were told.

Mr. Kaplan: That's what I want to find out.

Q. Did you ever go to school in Jamaica in Kingston? A. Yes.

Q. When did you go to school? A. When I was nine years old I started going to school.

Q. And before you were nine years old had you lived any other place besides Jamaica? A. Yes.

Q. Where? A. I was living in the South.

Q. When did you live in the South?

The Court: If you remember. I think you said you spent three years in Jamaica, is that right?

Witness: Yes, in 1966.

The Court: Now, before 1966 where did you live?

Witness: In the South.

The Court: For how long, as long as you can remember?

Witness: Yes.

The Court: And as far as you know, you might

Rudolph Mills—for People—Cross

have been born in the South. You don't know whether you were born in the South or not?

Witness: Yes.

The Court: But in 1966 from the time you can remember, you lived in the South?

Witness: Yes.

Q. When were you born? A. The third of July.

The Court: That's hearsay, too, you know.

Q. When were you born? A. Third of July, 1954.

Q. Where did you live from 1954 until 1966? A. Between the South and Jamaica.

Q. Did you live in Jamaica first before you went to the South? A. No, I was living in the South, then I went to Jamaica.

Rudolph Mills—for People—Cross

Q. When did you last see your mother?

Mr. Davenport: Judge, I object to that.

Mr. Kaplan: May I approach the bench, your Honor, and make an offer of proof?

The Court: Yes.

(Colloquy not transcribed.)

(Luncheon recess taken.)

AFTERNOON SESSION

(Defendant and counsel present; assistant district attorney present; jury returned to the courtroom at 2:21 p.m.)

The Clerk: All jurors are present. Do both sides waive calling of the roll?

Mr. Davenport: So waived.

The Court: Do you waive calling of the roll?

Mr. Kaplan: Sure, Judge. For the record, I will do it every time.

RULOLPH MILLS, having been previously duly sworn, resumed the witness stand and was examined and testified further as follows:

The Clerk: Mr. Mills, you were previously sworn. You are still under oath.

Rudolph Mills—for People—Cross

Cross-Examination by Mr. Kaplan (Continued):

Q. Mr. Mills, where do you presently reside now? A. 312 Jefferson Avenue.

Q. What?

The Court: 312 Jefferson Avenue.

Q. Are you incarcerated at all at the present time?

Mr. Davenport: Your Honor, I object to the word "incarcerated."

The Court: I will allow it.

A. Yes.

Q. Where? A. In the Civil Jail.

Q. How long have you been there? A. Approximately three months and eight days.

Q. You were indicted and charged with murder for this very same crime, isn't that right? A. Yes.

Q. Do you know what disposition was every made of that case? A. I was told that it would be dismissed after my testimony.

Q. After your testimony in this case? A. Yes.

Q. By the way, Mr. Mills, do you know what rape is? A. Yes.

Q. Did you ever commit rape in Admiral Town, Kingston, Jamaica? A. No.

Mr. Davenport: Your Honor, I ask for an instruction to the jury as to the question.

The Court: It's the answer to the question that counts as the evidence in the case. Don't substitute the question for the answer.

Rudolph Mills—for People—Cross

Q. Mr. Mills, were you working on August 13, 1971?

A. No, sir.

Q. When had you worked last before that? A. My job before, before that time, was with Allied Maintenance Company.

Q. When? A. (No response.)

Q. Do you remember when? A. No, I can't remember the specific time.

Q. How long did you work for them? A. About three months.

Q. And how long have you been up here in New York City, by the way? A. I been in New York City from the 14th of November, 1972.

Q. So up until, say, August of 1971, you had been up here about eight or nine months, ten months? A. Yeah.

Q. About that, right? A. Yes.

Q. And during that time you only worked three months in New York City? A. Yes.

Q. Before you came into New York City—you said 14th of November, right? A. Yeah.

Q. —in 1970—where had you lived? A. I was living in the South.

Q. Did you work down there? A. No.

Q. When you came up here, who did you come up here to stay with? A. With my cousin.

Q. What is your cousin's name? A. Anthony Maris.

Q. Who supported you? A. My cousin.

Q. How old is your cousin? A. About 27 or 28 years old.

Q. Is he married? A. No.

Q. And did you live with him? A. Yes.

Q. Who lived at 104 Rogers Avenue? A. My step-mother's son.

Rudolph Mills—for People—Cross

Q. What is your stepmother's son's name? A. I know his surname is Crooks.

Q. What is his first name? It's your stepmother's son. It's your stepbrother, isn't it? A. We usually call him—

Q. What is his Christian first name? A. I don't know.

The Court: What do you call him?

The Witness: We call him Porky.

Q. What is your stepmother's name? A. Silvia.

Q. Silvia what? A. Crooks.

Q. How many people lived at 104 Rogers Avenue? A. Well, after they abandoned the building, she wasn't living there no more.

Q. Was Porky living there? A. Yes?

Q. I want you to tell me what kind of a building it was. Was it a house with one family, a one-family house, or a two-family house? Just give me an idea of what type of house, 104 Rogers Avenue was. A. It was like a one-family.

Q. How many people lived there with you and Porky? A. I wasn't living there.

Q. Well, what were you doing there on August 13, 1971? A. I usually go there whenever I want to.

Q. Can you explain that to me, Mr. Mills, what you mean you used to go there whenever you want to? A. That's not where I definitely reside. I go there temporarily.

Q. I'm sorry, you what? A. I go there temporarily.

Q. Had you been there temporarily on August 13th? A. Yes.

Q. How long had you been staying there? A. I wasn't living at 104 Rogers Avenue.

Q. What were you doing there on August 13, 1971? A. I go to see my stepbrother.

Q. Was Porky there? A. No.

Rudolph Mills—for People—Cross

Q. Who was there? You said Charles West was there?

A. Yes.

Q. Who else was there? A. West, Barrett, and Rufus.

Q. Do they all live there? A. Yes.

Q. And so you went and you saw them, right? A. Yes.

Q. How many bedrooms in the house? A. Four.

Q. Which room were you in when you said Mr. Robinson came into the house earlier? A. I was in the room next to the street.

Q. You were in the room next to the three?

The Court: Next to the street.

Q. By the way, this accent you have, that isn't a Southern accent, is it? A. No.

Q. What kind of an accent is it? A. It's patois.

Q. Was that from Haiti? A. No, that's from Jamaica.

Q. The boys talk this way—you talk this way if you are a patois? A. I couldn't tell you because what you learn is English in Jamaica, and that. That's just another way of communicating with each other.

Q. Did you learn English in Jamaica? A. Yeah.

Q. You said there were four bedrooms—withdraw that. This house, is it a frame house or a brick house? A. It's a frame house.

Q. And when you come into the house, do you have to knock on the door? A. Yeah.

Q. Did Robinson have a key to come into the house? A. No.

Q. Do you know of your own knowledge how he came into the house? A. Yes.

Q. How did he come into the house? I am talking about the first time you said—I want you to tell me how he came in the first time. A. I was the one that let him in.

Rudolph Mills—for People—Cross

Q. Did he knock on the door ? A. Yes.

Q. You let him in the first time. Was there anybody with him? A. No.

The Court: You let him in both times, did you not?

The Witness: Yes.

Q. Nobody was with him? A. No.

Q. When did George and Gargo come there? A. George and Gargo was there before, while I came.

Q. Who let George and Gargo in? A. Who let them in?

Q. Yes. A. I don't know. It's possible that one of the other three guys that was in the house let them in.

Q. Do you know what time George and Gargo got there?

A. When I saw them, I would say. The time I saw them in the house was about ten-thirty.

Q. Do you know what time Mr. Robinson got there? A. Approximately eleven o'clock.

Q. What time did you get to the house? A. Ten o'clock.

Q. Where were you before that? A. I was coming from 312 Jefferson Avenue.

Q. What's 330— A. 312.

Q. What's 312 Jefferson Avenue? What kind of place is 312 Jefferson Avenue?

The Court: That's where he lived with a cousin. You you mean what kind of a house?

Q. What kind of a place is that, 312 Jefferson Avenue?

A. It's an apartment building.

Q. Were you ever in a record store? A. Yes.

Q. When were you at the record store? A. That was before I went to 104 Rogers Avenue, I stopped there on my way to 104 Rogers Avenue.

Rudolph Mills—for People—Cross

Q. When you got to 104 Rogers Avenue, George and Gargo weren't there yet? A. Right.

Q. Who was there when you got there? A. West, Rufus and Barrett. There was about one or two others, but I don't really know their names.

Q. What kind of a place is this 104 Rogers Avenue? Is it a hangout? A. It's not definitely a hangout.

Q. What is it? A. It's a building being maintained by my stepbrother and Barrett, both of them pay the rent, but Barrett got friends of his that comes there to visit him.

Q. Is this where Jamaicans hang out? A. That's right, yes.

Q. Do you remember how George was dressed, April 13, 1971? A. No.

Q. Do you remember how Gargo was dressed? A. No.

Q. Do you remember how Paul Robinson was dressed?
A. The only thing I do remember he was wearing was a white T-shirt.

Q. A white T-shirt? A. Yes.

Q. Do you remember whether or not George was wearing a coat? A. No.

Q. Did you see a gun that George had? A. No.

Q. Did you see a gun that Gargo had? A. No.

Q. Did you see a knife that George had? A. No.

Q. Did you see George or Gargo have any kind of weapons? A. No.

Q. I think you testified that you overheard a conversation between Robinson and George Gargo, didn't you? A. Yes.

Q. What room were they in when they were talking? A. They was in the same room I was at, when I first saw Paul kept coming to the apartment.

Rudolph Mills—for People—Cross

Q. I'm sorry, I didn't get that. You tell me— A. I told you before, I was in the room next to the street.

Q. Go ahead. A. That's the same room I was in. I only came out to let him in the room inside the apartment.

Q. Then you heard them talking, didn't you? A. Yes.

Q. Where were you when you heard them talking? A. I went back into the room with Bob.

Q. Back into the room where? A. I went back into the room with Paul. That's when he joined the conversation.

Q. With Paul? A. Yes.

Q. And you joined the conversation? A. I wasn't involved in the conversation.

Q. And were you standing there when they were talking? A. Yes.

Q. And they just talked out loud about what they were going to do? A. Yes.

Q. And that's all they said, just what they were going to do? A. Yes.

Q. Did they say anything to you about you shouldn't tell anybody anything? A. No.

Q. Who else was in the room besides you and Paul and George and Gargo? A. Nobody else was.

Q. Where was Charles West? A. They was in the back.

Q. Did you go back and tell Charles West anything? A. No.

Q. Did you go and tell anybody what they were going to do? A. No.

Q. Were you smoking marijuana that night? A. No.

Q. And they left, is that right; George and Gargo and Paul, you say, left? A. Yeah.

Q. And then what did you do, go to sleep? A. No.

Q. What did you do? A. I went and took a bath, and I went in bed. I wasn't sleeping.

Rudolph Mills—for People—Cross

Q. Did you feel well that night? A. Yes.

Q. Were you sick? A. No.

Q. Did you have the flu? A. No.

Q. You are sure? A. I'm sure.

Q. This bed you were sleeping in, was anyone else in the room besides you lying in that bed? A. Repeat that again?

Q. Was anybody else in the bedroom with you during that night? A. No.

Q. You were there, no one else slept there in that same room with you? A. No one.

Q. Did Charles West leave? A. No.

Q. He stayed there? A. Yes.

Q. What room was he in? A. He was in the back.

Q. And what about the other two fellows who were there, did they stay there? A. Yes, they were in the back.

Q. You had a bedroom all by yourself? A. Yes.

Q. How well do you know Paul Robinson? A. I know him for about six months prior to my arrest.

Q. How well did you know George? A. I knew George, he used to come to 104 Rogers Avenue.

Q. Who, George? A. Yes.

Q. And Gargo, did he come to 104? A. Yes.

Q. You knew them, didn't you? A. Yes.

Q. By the way, have you ever been convicted of a crime? A. No.

Q. And do you look anything like George looks or George looked? A. I would say yes.

Q. Did you look anything like Gargo looks? A. No.

Q. Who does Darian look like? A. I would say he would more resemble Gargo.

Rudolph Mills—for People—Cross

Q. You say you resemble George. Was he the same size as you? A. Yes.

Q. Did he have the same kind of haircut as you? A. I don't know if he cuts his hair the way I do.

Q. Did he have the same high cheekbones as you have? A. I don't know.

Q. Mr. Mills, you say that Mr. Robinson came back? A. Yes.

Q. Isn't that right? A. Yes.

Q. What time did he come back? A. About two o'clock.

Q. And who did he come back with? A. With George and Gargo.

Q. And who let them in the house? A. I did.

Q. Did they say anything to you? A. Did they say anything to me?

Q. Yes. A. No, I asked a question.

Q. What did you ask? A. I asked what happened.

Q. Yes. What made you ask the question what happened?

Mr. Davenport: I object to it.

The Court: Overruled.

A. Because the way they was exhausted, they was sweating.

Q. They were what? A. Exhausted, breathing loud and sweating.

Q. What did you ask them? A. I asked them what happened.

Q. Yes? What did they tell you? What did Robinson tell you, if anything? A. He told me they went to this park, they went to look for some money, they end up in a park on Eastern Parkway.

Rudolph Mills—for People—Cross

Q. They said they went to take some money? A. To look for some money.

Q. Go ahead. A. And then end up in a park on Eastern Parkway. He said George had a gun and he saw a girl and a dude, and they went over to this dude and George told him, "Empty your pocket."

The dude answered, and saying, "You got to kill me to get mine," or something like that. And he stopped backing away and put—about to put his hands in his pocket. George got scared of what he didn't know what the dude's intention—what he was up to, so he started firing shots.

Q. Who told you this, George or Gargo? A. The conversation started with me asking Paul what happened. Paul started, but all three of them finished the conversation the same way.

Q. They just came in the house, and you asked them and they told you what happened? A. Yes.

Q. How long did they stay in the house? A. They slept there.

Q. Overnight? A. Yes.

Q. And then when did they leave? A. They leave in the morning.

Q. What? A. In the morning.

Q. Did they tell you—did someone tell you that a girl had been shot? A. No.

Q. No one told you that anybody had been shot? A. No, they didn't tell me that a girl had been shot. They said somebody had been shot.

Q. And after they left, did you leave with them? A. What time are you talking about?

Q. I don't know. You tell me what time. What time did they leave? A. They left there in the morning.

Q. What time? A. About nine or ten o'clock.

Rudolph Mills—for People—Cross

Q. What did you do? A. I left the apartment.

Q. Did you call the police or tell anybody that someone had been shot? A. No.

Q. Who supported you while you were up here from November to August?

Mr. Davenport: Your Honor, objection. He has answered that question.

The Court: Yes, the testimony was that he worked for three months during that time, and the rest of the time—

The Witness: Yes.

Mr. Kaplan: Would your Honor just bear with me for a minute? I just want to look through something.

(Defense attorney confers with client off the record and out of the hearing of the jury.)

By Mr. Kaplan:

Q. Mr. Mills, do you know that after you were convicted of this very crime, that Paul Robinson went to the district attorney's office with the detectives, clearing you? Do you know that? A. Yes.

Q. What? A. Yes.

Q. And do you know that except for Paul Robinson making that statement, you would still stand convicted of that crime?

Mr. Davenport: Your Honor, I object to this. This is a summation.

The Court: Overruled.

Q. Do you know what? A. Yes.

Rudolph Mills—for People—Redirect

Redirect Examination by Mr. Davenport:

Q. Mr. Mills, do you remember on August 19, 1971 the day after you were arrested at 2:30 p.m., you were questioned by Assistant District Attorney Martin Munn, at the 71st Precinct? Do you remember an assistant district attorney being present and Detective Iannuccilli? A. Yes.

Q. Do you recall being asked this question—

Mr. Kaplan: I object, your Honor.

The Court: I don't know what the question is.

Mr. Kaplan: May I approach the bench, your Honor?

The Court: Surely.

(Conference at the bench off the record and out of the hearing of the jury.)

The Court: Objection is overruled.

Q. "Q. Would you be willing to tell me? A. Well, it was the night the incident happened.

"Q. Thursday night, early Friday morning, about midnight or after midnight about a week ago." Do you remember the assistant asking you that question and you giving this answer— A. Yes.

Q. —do you remember your answer, "Yes, that same night around two o'clock George, Gargo and Paul, they came at the house, the same house that the cops came in."

Do you remember that answer? A. Yes.

Q. Do you remember this question;

"Q. Which house was that? A. 104 Rogers Avenue."

Rudolph Mills—for People—Redirect

Do you remember that question and that answer? A. Yes.

Q. And do you remember this question:

"Q. And what happened? A. They came in, before they went to bed, Paul told me that they went looking for some money. They ended up by a park on Eastern Parkway, and there a dude and his girl, so they said—I don't know what they said to him about some money or something like that. And he said, 'Well, you get—take it, you got to kill me for it,' or something like that."

Do you recall your giving that answer to an assistant district attorney? A. Yes.

Q. Do you recall being asked this question:

"Q. After George, Gargo and Paul, did all three of them come home about two o'clock? A. Yes.

Do you recall being asked that question and giving that answer? A. Yes.

Mr. Kaplan: I will object. I don't think you are reading it correctly. You left out something.

Mr. Davenport: Im sorry. Mr. Kaplan is correct.

His answer is, "After George, Gargo and Paul, did all three of them come at two o'clock"? A. Yes.

Q. Do you recall Assistant District Attorney Martin Munn asked you this question and you gave this answer:

"Q. Are you telling me the truth? A. I am telling you the truth. You got to promise me you're not going to tell anybody about this, because if you tell them anything, they're going to say I'm an informer. They will try to do something to me about this."

A. Yes.

Q. Do you remember being asked that question and

Rudolph Mills—for People—Recross

giving that answer on the day you were arrested for this crime? A. Yes.

Recross-Examination by Mr. Kaplan:

Q. When you made the statement or gave this statement to the assistant district attorney on August 19, 1971, that was six days after this happened, right? A. Yes.

Q. And everything that took place was fresh in your mind, wasn't it? A. Yes.

Q. And there wasn't anything that you left out, was there? A. I suppose not.

Q. Is there anything in this statement, you may look at it, anything in this statement which says that Robinson, George and Gargo came to your house at 104 Rogers Avenue about ten-thirty at night on April 13th, or rather, August 13th or August 12th? A. Could you please repeat the question?

Q. Is there anything in your statement where you told the assistant district attorney that Gargo George and Paul came to your house, 104 Rogers Avenue, about ten o'clock the night before the incident? A. The night before the incident?

Q. Actually, the incident took place around twelve-thirty, after midnight, so that would be August 13th. Did they come there August 12th at ten o'clock at night or ten-thirty? A. No.

Q. You testified in your case, didn't you, when you were standing trial in this case? A. Yes.

Q. Did you ever testify in that trial about George, Gargo and Paul Robinson? A. I wasn't asked no such questions.

Q. Did you ever testify in that trial—

Mr. Davenport: Your Honor, I think we went through this matter a while ago. I think the Court made a ruling.

Rudolph Mills—for People—Recross

The Court: We did, Mr. Kaplan.

Mr. Kaplan: I thought because Mr. Davenport brought in this statement, I could use it for recross examination.

The Court: You have something there, right? Okay.

Mr. Davenport: He's got the same statement.

By Mr. Kaplan:

Q. Did you ever in your trial—

Mr. Davenport: That's what I am objecting to.

The Court: No. Do you urge that this be admitted as prior—Mr. Kaplan wants to show on recross prior inconsistencies or lack of consistency.

Mr. Davenport: That's correct, but the witness already answered before that he didn't say that at the trial. He has already answered that in the negative. He didn't make reference to George or Gargo.

The Court: All right, that's what Mr. Kaplan wants to know.

Mr. Kaplan: May I ask the question?

The Court: But he has not concluded from exploring.

Q. During your trial, did you ever make a statement about George, Gargo and Robinson coming to your house at 104 Rogers Avenue? A. No.

Mr. Kaplan: No further questions.

Mr. Davenport: I am going to ask permission of the Court, because of what Mr. Kaplan did, by ask-

Rudolph Mills—for People—Recross

ing the witness to look at this statement, I think to get it in context, and it's a very brief statement. It's only five pages. I am going to ask that I be permitted to introduce this into evidence to read the questions, because I think they might explain the fact that—

Mr. Kaplan: Judge, may I approach the bench?

The Court: Of course.

(Conference at the bench off the record and out of the hearing of the jury.)

Mr. Davenport: No further questions.

Mr. Kaplan: Just one question, if I may.

By Mr. Kaplan:

Q. Were you cooking any food at the house on August 12 that night or the early morning of August 13th? A. Yes.

Q. What time were you cooking?

The Court: I think we have the testimony that he was cooking, he asked the three of them if they wanted to eat, and they said no, they didn't have any time.

Q. Let me ask you this: Is it your stepmother that owned the house or your godmother's son—your stepmother or your godmother? A. My godmother that what I relate to as my stepmother.

The Court: You call your godmother your stepmother?

The Witness: Yes.

The Court: In other words, she was not married to your father?

Paul Robinson—for Defendant—Direct

PAUL ROBINSON, residing at 457 Schenectady Avenue, Brooklyn, New York, the defendant herein, called as a witness in his own behalf, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Kaplan:

Q. Mr. Robinson, I am going to ask you to keep your voice up loud and clear. You have a Jamaican accent, and sometimes it's difficult for me to understand it, and we have been talking to each other about this case, so you can imagine how much more difficult it would be for the jury to understand you, so please speak distinctly and loudly.

If you don't understand a question, just tell me.

Mr. Robinson, have you ever been convicted of a crime?

A. No, sir.

Q. On August 13, 1971, were you in the park with Gargo and George? A. Yes, sir.

Q. Had you met them earlier that day, August 12th? A. In the day?

Q. When I say in the day, I mean night or day. A. I had seen them at 104 Rogers Avenue.

Q. What time? A. About eleven-twenty, about that time.

Q. Who did you see there? Gargo and George.

Q. At Rogers Avenue? A. Yes.

Q. At what time? A. About eleven.

Q. Was that in the evening or morning? A. In the evening.

Q. And who was there when you saw them there? A. I left. A lot of other fellows was there.

Q. Did you see Rudolph Mills there? A. Yes, sir.

Q. By the way, can you describe George, what he looked

Paul Robinson—for Defendant—Direct

like? A. Well, he was stout, black complexion, black hair, and about five feet, eight inches.

Q. Did he look anything like Mills? A. No, sir.

Q. What did Gargo look like? A. Gargo, he had clear complexion, one of his eyes—

Q. Indicating his left eye—was what? A. Was fogged. He was a little taller. He was about five, eight and a half, and slim.

Q. Did he have a beard or anything? A. Yes, sir.

Q. What did he have? He had a beard.

Q. Did either one of those two fellows look like Mills or Darian? A. No, sir, I wouldn't—mostly went opposite.

Q. What? A. I would most say it went opposite. George more looked like Darian, and Gargo look more like Mills.

Q. When you were there, how did you happen to go to 104 Rogers Avenue? A. I had seen Mills earlier in the day.

Q. Let me ask you, did you ever see Darian? A. Yes, sir.

Q. Does he have a beard? A. No, sir, not as I recall.

Q. Did Mills have a beard on August 13th? A. No, sir.

Q. Tell me how you happened to go to 104 Rogers Avenue. A. I had known Mills about a month and a half before the incident. I had met him at Kingston Avenue and Park Place. There's a park there that we used to play soccer at. He used—he was a good soccer player at that time, and that's how I got to know him. I saw him in the day about ten o'clock, twelve-thirty. He told me he would be at 104 Rogers Avenue and asked me if I was coming up. I been up there about three times—about two times before.

Paul Robinson—for Defendant—Direct

Q. What kind of place is this? A. It was a place where a lot of fellows used to be at.

Q. What kind of fellows? A. Jamaican.

Q. What did you do there? A. The only person I used to know was Mills there.

Q. What did they do, hang around there? A. Play cards and play music records and—

Q. Were there beds to sleep there? A. Yeah, there were beds to sleep there.

Q. Was there a kitchen to cook food? A. Yes, sir.

Q. Go ahead. You saw Gargo and George. Now, was Mills there when you saw Gargo and George? A. Yes, sir, but Mills was in a separate section of the house. He was in the front of the house, the first room.

Q. Where were you? A. That's where I was, too. I was in the same room with him.

Q. You were where? A. In the same room with him.

Q. With who? A. With Mills.

Q. And where was Gargo and George? A. They were direct back of the house. There's like a living room at the back of the house where they would be playing cards.

Q. Did there come a time when you and Gargo were talking? A. No, sir, absolute—I don't know them that well.

Q. Did there come a time when you left the house? A. Yes, sir.

Q. What time did you leave the house? A. I left the house at about eleven-thirty.

Q. Who did you leave with? A. I left with myself. I left alone and—

Q. You left alone? A. Yes.

Q. Did there come a time when you saw Gargo and George again? A. That same night?

Paul Robinson—for Defendant—Direct

Q. Yes. A. Yes.

Q. Where did you see them ? A. I saw them at Lincoln Place, Lincoln and Nostrand, I think.

Q. How long was this after you left?

The Court: Wait a minute. Nostrand Avenue is one block from Rogers Avenue, is that right?

The Witness: Yes, sir.

The Court: Where is 104 Rogers Avenue?

The Witness: 104 Rogers Avenue is in between Sterling and Park Place.

Q. You would have to go down to Sterling Place, Park Place, and then Lincoln Place, is that right? A. Lincoln, St. Johns, Sterling.

Q. You walked about three blocks, is that right ? A. Yes, sir.

Q. And then you saw Gargo and George. A. Yes, sir.

Q. Where did you see them, on the corner? A. I saw them coming up towards—going towards the subway, they wasn't coming towards my direction.

Q. Where were you going? A. To take the train.

Q. To take the train where? A. At Eastern Parkway and Nostrand Avenue.

Q. To where? A. To Utica Avenue.

Q. Who lives at Utica—you live at the Utica Avenue station? A. Schenectady Avenue and Utica Avenue is the same stop. I lives on Schenectady Avenue, but that section of the station is locked at nine o'clock. So I would have to go to Utica, which is a block farther from the next block after Schenectady.

The Court: The Court will take judicial notice that Schenectady Avenue is one block west.

Paul Robinson—for Defendant—Direct

Q. Were you on the way going home then? A. Yes, sir.

Q. So you saw Gargo and George? A. Yes, sir.

Q. And then what happened? A. Well, I was waiting for the traffic lights. I was waiting for the traffic light to give me the walk sign, and the others reached beside me. We went in the tunnel together, and George asked me for a dollar. He said he had a twenty-dollar bill, and he could not get it changed in the booth. So he asked me for a dollar, and I gave it to him, and we took the train together.

Q. Go ahead. A. Well, we came—I came out this station, Utica Avenue, came up the steps. When I was about twenty yards away from the tunnel, which was about seven yards away from Utica Avenue, I heard some music. I really didn't know where it comes from.

Q. Was anybody walking with you at that time? A. Yes, sir.

Q. Who? A. George and Gargo was.

Q. Go ahead. A. George asked me if I was going over to the music festival. I didn't know what music festival. He told me that there was a music festival over at the park.

Q. What the name of the park? A. Lincoln Terrace Park.

Q. How far is Lincoln Terrance Park from where you live? A. Two blocks.

Q. Then what did you do?

The Court: Wait a minute. They are at Utica Avenue and Schenectady is one block, and the park is—Rochester is one block east of Utica, is that right?

The Witness: Yes.

Paul Robinson—for Defendant—Direct

Q. Now, did you then walk to the park with George and Gargo? A. Yes, sir.

Q. Go ahead, then what? A. Well, they were talking about a girl.

Q. I want you to tell me—you said they were talking. I want you to tell me what they said. A. They were talking about a girl, the whole conversation as they left the train was about a girl, and dancing, and they were about which girl could dance good and which girl couldn't dance good.

I'm not sure, I think that's what they were talking about.

Q. Go ahead. A. They asked me if I lived around there. I told them yeah. So I went to the park, to the music festival. And we was there for about four minutes, the three of us. Then they asked me if I could dance American music. I told them yes, but I wasn't good at it. About—after about five minutes, I didn't see them no more. It was real crowded, and I stayed there by myself for about fourteen minutes, about that. And then I decided to go home.

Q. Then what happened? A. I was taking a shortcut through the park to reach my—it wasn't directly a shortcut, but it was the easiest way, because you would be going down all the time instead of going up.

Q. Go ahead. A. So the music festival is in a valley in the higher section of the park. The park has three sections.

Q. Go ahead. A. When I reached in the middle section, the middle section of the park, I heard one of them call me. I didn't know which one.

Q. Where were they when you were walking? A. They were behind me.

Paul Robinson—for Defendant—Direct

Q. How far behind you, do you know? A. No, I don't, about twenty yards.

Q. Go ahead. A. Well, they called me.

Q. What did they call you? A. Youth. I didn't respond to it because of the meaning of it.

Q. What? A. I didn't respond.

Q. Why? A. The meaning of it.

Q. Is "Youth" a bad name in Jamaican? A. It's not a bad word, but it's like they are belittling me.

Q. They were putting you down? A. Yeah.

The Court: In other words, "Man" is the word that you want.

Q. Go ahead. A. Well, I started to go to the steps, cut into the soccer field. I was walking across the soccer field and to a shortcut that would drop you at Rogers and East New York. And in the motion of going through the fence to reach on the soccer field, they were coming along the steps. They were almost on the steps by that time.

Q. Let me show you Defendant's Exhibit A.

Mr. Kaplan: I will proceed, Judge—

The Court: All right.

Mr. Kaplan: —before we find the exhibit.

Q. Mr. Robinson, is this the—we have been talking about the steps. Is this like the walkway on which one side has a brick wall and on the other side a wire fence? A. Yes, sir.

Q. And is that wire fence around, you call it the football field or soccer field? A. Yes, it's more soccer than football.

Paul Robinson—for Defendant—Direct

Q. So you are in that area? A. Yes, sir.

Q. Then what happened? A. Then as they came down the steps—

Q. Who is "they"? You must tell me who you are talking about. A. George and Gargo. They said that they're going to look at some prostitute.

Q. They said what? A. They said they were going to look on some prostitute.

The Court: At some prostitute?

The Witness: Yes.

Q. Go ahead A. I turned around and looked, and there was a young man and a young woman embracing against the wall.

Q. Is that young man Alberto Greene? A. Yes, sir.

Q. And was the young girl Germain Phillips, now deceased? A. Yes, sir.

Q. Go ahead. A. They weren't walking. She was in front of him against the wall. Gargo and George went on walking towards them. Well, I followed. I wasn't far behind them. I was about two yards behind them. Well, they passed, and as I passed them, I know that it was not prostitute, but like they wasn't having having sexual relations. She was embracing him, and you could see by that that she wasn't a prostitute.

So I passed them, walked about twenty yards, twenty-two yards past them, past them, when I decided to go home. You could see that there wasn't no one else there. Usually there used to be a lot of people down there.

Q. Go ahead. A. I told them—George and Gargo was in front of me at that time. I told them that I was going home. So I turned around, took a few steps, I'm going

Paul Robinson—for Defendant—Direct

towards Rogers Avenue, when George and Gargo went back, came back my way and passed me. They were walking a little more faster than they usually do. George—Gargo was in front of George, and George was about two yards in front of me when he reach in front of Mr. Greene, and Gargo was about a yard in front of him. As George reach in front of him, he spinned around and he pulled something. At that time I didn't know it was a gun, but I know Gargo had a knife. I could tell by the click.

Q. You what? How? A. By the click that went out.

Q. Had you seen the knife before? A. No, sir, but I know those kind of knives. They are illegal in Jamaica. They are special knives.

Q. So you heard a click A. Yes, sir.

Q. Go ahead. A. And Greene started to move slowly to my direction. I remember moving towards the fence. I could have make a move at that time, but I don't recall. But I don't recall moving against the wall. All I remember is moving towards the fence, because I gave the girl way, and the girl—when we were going back, when I was going back, Gargo and George was in front of me, and the girl wasn't in front of Greene no more, she was at this left, about a yard to his left, two feet.

Q. Yes? A. The girl ran towards me and left Mr. Greene alone with Gargo and George. Well, Gargo was saying something to George, saying that, "Move, and let me cut him." He cursed a Jamaican bad word at the same time, and he has his hand up.

The Court: Who?

The Witness: Gargo had his hand up in the air.

Paul Robinson—for Defendant—Direct

Q. What did he have in that hand? A. A knife.

Well, before that, George had said to Mr. Greene that he was to give up everything, and Mr. Greene replied something, objected to it, like he said, "You have to take it," something to that.

Q. Now, George had the gun? A. Yes, sir.

Q. Now, what happened? A. Well, Mr. Greene was coming toward me, but he had to do it in such a case, in such a way that they didn't shoot at him, like if he was to run, he didn't want to take that chance, at least that's what I think. So he was coming back taking steps by steps, when Gargo came, who was on his right—came more towards his pocket. He came like he used his right and put it towards his back.

Q. Who did that? A. Mr. Greene.

Q. Mr. Greene put his right hand toward his back pocket?

A. Right back pocket.

I didn't know if he was reaching for a weapon or he was trying to protect—

Q. What were you doing all this time? A. Well, this time I was moving, I remember moving towards the fence.

Q. Go ahead. How far away were you from Gargo and George? A. I was about—George had stepped about two steps back, because at first the gun was on Mr. Greene directly.

Q. You were what— A. It was on Mr. Greene.

Q. How far were you from George? A. At that time I was about two yards away.

Q. How far were you from Gargo?

The Court: You are talking about yards. Do you realize a yard is three feet?

The Witness: Two yards is six feet.

The Court: You say—

Paul Robinson—for Defendant—Direct

Q. Do you know how many yards in feet? A. Three feet in a yard.

Q. So you were about nine feet away? A. Yes, sir.

Q. And how far were you from Gargo? A. From Gargo was about two feet away from George. That makes me about nine.

Q. How far away were you from Mr. Greene? A. At that time I was—I wasn't that far from Mr. Greene at that time. About two yards, because he was coming towards my direction.

Q. He was coming towards you at this time? A. Yes.

Q. And the girl, where was she? A. She was behind me, about one yard behind me, to the right of my back.

Q. At any time did you step in Mr. Greene's or the girl's way so that they couldn't get out of the way? A. No, sir. At that time the girl was behind me.

Q. So she was past you? A. Yes, she passed me.

Q. Go ahead. Where was Greene? A. Greene, he was still against the wall, but he was trying to sneak out slowly, like coming down slowly, because like the gun was on him, and Gargo had his hand up with the knife.

Q. Now, when the girl was shot, where was she? A. Well, when the girl was shot, she was going back towards Mr. Greene.

Q. So she had passed you and she was returning. Now, when this happened, what did you do, if anything? A. I stand up and moved away. I remember moving as far back out of the way as possible. I remember touching the fence.

Q. And then did you say anything or do anything when the girl was shot? A. When shot started to fire, I was directly numb.

Q. You were what? A. Directly numb. But I remember in the first click I said, "No, no, no."

Paul Robinson—for Defendant—Direct

Q. At the trial—you had a trial before—at that trial, you said you didn't say anything.

Mr. Davenport: Your Honor, I think perhaps I should ask that question.

The Court: I didn't hear any objection. Let's conduct a trial in an orderly way.

The objection is sustained, and, Mr. Kaplan, don't you testify. Don't tell the witness what he said. You may ask him what he said.

Q. Do you remember testifying sometime ago and certain questions were asked?

Mr. Davenport: I am going to object to this.

The Court: Overruled.

Q. Certain questions were asked of you and certain answers were given by you. Do you remember being asked this question:

"George and Gargo have got a knife and a gun out, and you don't say anything, is that right?"

Do you remember being asked that question? A. Yes, sir.

Q. Do you remember answering, "I didn't say. I didn't know what to say."

Do you remember giving that answer? A. Yes.

Q. Do you remember being asked this question and giving this answer:

"Q. You didn't say anything, is that correct? A. Yes, sir."

Do you remember being asked that question? A. Yes, sir.

Paul Robinson—for Defendant—Direct

Q. And you gave this answer:

"A. Yes."

A. Yes, sir.

Q. And do you remember being asked this question and giving this answer:

"Q. You just stood there? A. Yes."

Do you remember being asked that question and giving that answer?

The Court: Mr. Kaplan, the witness has testified that he was more or less numb, is that right?

Mr. Kaplan: But he said certain words, he said, "No, no," that's the thing, Judge.

Q. You now say that you said some words, "No, no"?

A. Yes.

Q. Is that right? A. Yes, sir.

Q. But you did testify to that in the trial before? A. I didn't understand what he meant.

Q. Let me ask you this question, at any time, either at 104 Rogers Avenue, walking to the park, or when you were in the park, when you saw Mr. Greene and the late Miss Phillips, at any time did you have a conversation with George and Gargo about committing a robbery? A. No, sir.

Q. Did you know that they were going to commit a robbery? A. No, sir.

Q. Did you know that George had a gun? A. No, sir.

Q. Did you know that Gargo had a knife? A. No, sir.

Q. By the way, do you know where George is today?

A. He's dead.

Q. And where Gargo is? A. He's dead also.

Paul Robinson—for Defendant—Direct

Q. And do you know when they died—

Mr. Davenport: Your Honor, I object.

The Court: I will permit him to answer.

Q. Do you know when they died? A. Gargo died about three weeks before I got shot. That was about December or January sometime.

The Court: December or January?

The Witness: Yes, that was—

The Court: December of 1971, is that right?

The Witness: Yes, sir.

The Court: Or January of 1972?

The Witness: 1972, yes, sir.

Q. And Gargo, when he died— A. No, that was Gargo.

Q. And George? A. George died while I was in custody for this.

Q. Now, so George died, as I understand, sometime after May 31, 1972? A. Yes, sir.

Q. But you don't know the exact time; is that right? A. Yes.

Q. Now, did there come a time when you spoke to Detective Iannucilli outside of this courtroom? A. yes, sir.

Q. And I think that was around May 31st of 1972, is that right? A. Yes, sir.

Q. Now, did you have a conversation with Detective Iannucilli? Did you say something to him and did he say something to you? A. Yes.

Q. Do you remember to the best of your recollection what he said to you and what you said to him? A. I told

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him that I was present in the park, and all of us, and that George and Gargo did shoot him. He had already knew about it. And I told him that Darian was innocent. He already knew that.

Q. At any time did you tell Detective Iannucilli when you were walking from this courthouse over to the district attorney's office on May 31st, at any time did you tell Detective Iannucilli that you knew—that you had a discussion with George and Gargo that you were going and that the three of you were going to take off somebody? A. The only thing I told him, Mr. Iannucilli, on my way to the district attorney's building, was that I didn't trust him because of—I told him I didn't trust him. He called Mr. Lombardo and told Mr. Lombardo if he would speak to him because I didn't trust him because of a past incident.

Q. But did you ever tell him anything else other than that? A. No, sir.

Q. You were questioned by an assistant district attorney on that day, weren't you? A. Yes, sir.

Q. And was Detective Iannucilli in the room when the questions were being asked of you? A. Yes, sir.

Q. Was any question ever asked of you other than what appears in this statement? A. No, sir.

Q. You heard Rudolph Mills testify, didn't you? A. Yes, sir.

Q. And after this incident took place in the park, did you go back to 104 Rogers Avenue? A. Yes, sir.

Q. Who went back with you to 104 Rogers Avenue? A. No one, sir.

Q. Just you alone? A. Yes, sir.

Q. George and Gargo didn't go back with you? A. No, sir.

Paul Robinson—for Defendant—Direct

Q. What happened when you went back to 104 Rogers?
 A. When I rang the bell, I rung the bell, and Charles West, he opened the door for me. When I went in, Mills was sleeping. I woke him up and told him what happened. I tried to tell him about it, I had to tell him a few times over, because he kept saying, what was happening, what was I talking about. He didn't understand what I was talking about.

Q. At any time did you tell Mills that you, George and Gargo went in that park to rob anybody? A. No, sir.

Q. You, George and Gargo were in 104 Rogers Avenue before you went into the park, right? A. Yes, sir.

Q. Did you have a discussion then about going into the park and committing a robbery? A. No, sir. As I said before, they was in the next section of the house.

Q. Did you even talk to them at that time? A. No. I didn't go around that section of the house. The stair around there, I didn't know no one around there. It was about the third, I think—it was the third time I was at the house; that night.

Q. Let me ask you this question, Mr. Robinson: You knew that Mills and Darian were standing trial for this crime, didn't you? A. Yes, sir.

Q. You knew that they had nothing to do with it, didn't you? A. Yes, sir.

Q. And yet you never said anything? A. I told Mr. Iannucilli that.

Q. Mr. who? A. I told Detective Iannucilli that they didn't do it. He told me himself the same day he arrested Mills, that he knew he was innocent.

Q. He knew that? A. Yes, that's what he told me the same day.

Q. Yes? A. And I think it was the 19th, on the 19th

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he came to me. And he showed me—he asked me if I knew Rudolph Mills, and I told him yes. He showed me a diagram picture, and I told him if I knew Darian, and I said yes. He told me they were arrested for murder. And then he asked me if I knew George and Gargo. I told him I see them around, I told him I saw them a few times. He said that he knew that George and Gargo did it, and it wasn't Mills and Darian, and he knew that I was also there, but I didn't take part in the action, and if I was to get Gargo and George for him, he would guarantee me that I wouldn't be involved in nothing.

Well, then, I asked him a question that if he knew that Mills and Darian didn't do it, why did he arrest them? Then he and a few other detectives started saying, "Smart guy, huh? Smart guy."

So then he came back. He came back that same day and said that Gargo was arrested, and another precinct—I don't remember the precinct he said, and he called my name. He said that I was present with them, and I knew about them, knew about everything, and I better tell him everything now before it reached the court.

I told him that it's better that it reach the court and that way Gargo would be saying it in front of me. And then he said, "That's all right." All he said, that if he knew that if he could prove that I have anything to do with it, he is going to throw the book at me, even if it took a year from now.

Q. Go ahead. But you still never told anybody until May 31st. Was there any reason for that? A. I was scared of being killed.

Q. By whom? A. By George and Gargo.

Q. But one of them was already dead before May 31st.

A. You said before May 31st. Well, before May 31st. After

Paul Robinson—for Defendant—Direct

Gargo got killed, that's when I decided I was going to do something about it. Well, I started looking for George, and I wanted to investigate a tape from him, tape his voice.

Q. You wanted to do what?

The Court: He wanted to investigate, tape his voice.

A. On a tape recorder with me and him discussing the matter. But I didn't see him. Well, Iannucilli keep on seeing me, and I found him and let him know that Gargo was killed.

Q. You told him that? A. Yes, I told him that. He was trying to make me find out where he was killed, and identify the body, and all. He brought the picture and asked me if that was Gargo.

Well, not long, about three weeks after Gargo was killed, when I started going around looking for George, that's when I was shot, shot in my leg.

Q. You don't know who shot you? A. I don't know the names of them, but I do know that they are friends of George and Gargo.

Mr. Davenport: I have no further questions.

The Court: I have another matter here now. Suppose we take a short recess. We will excuse the jury, and we will go into cross-examination. Same admonition still applies, gentlemen. Do not discuss the case with anybody.

You may step down.

(A recess was taken, after which the jury returned to the courtroom, and the trial resumed.)

Paul Robinson—for Defendant—Cross

The Clerk: All jurors are present. Do you waive calling the roll?

Mr. Davenport: Yes.

Mr. Kaplan: Yes.

The Clerk: Defendant and all counsel present; jury present.

PAUL ROBINSON, the defendant herein, resumed the witness stand and was examined and testified further as follows:

Cross-examination by Mr. Davenport:

Q. Mr. Robinson, you said that after Mr. Kaplan read some questions, that you didn't understand the questions, that is why you said you didn't say anything, is that right?

A. Yes.

Q. And, in fact, you said, "No, no, no," something like that? A. Yes.

Q. I just wanted to read this again to see that you didn't understand, because I was the one that asked you these questions, and I don't want to seem hurt, but I think I speak rather clearly.

"Q. And George and Gargo have got a knife and a gun out, and you don't say anything, is that right? A. I didn't say—I didn't know what to say."

That is the question and that's the answer; is that right?

A. Yes, sir.

Q. "Q. You didn't say anything, is that correct? A. Yes."

That's the question that you didn't understand? A. Wasn't you asking me if I said something to them?

Paul Robinson—for Defendant—Cross

Q. No. The question is as I read it. A. You asked me if I said anything to them, isn't that right?

Q. The question was as I read it. I'm sure you will agree I am reading it correctly, Mr. Kaplan.

"Q. You just stood there? A. Yes."

You didn't understand those questions, and those answers, is that correct? You misunderstood my questions? A. Yes, sir.

Q. And, in fact, you said, when you saw the gun, "No, no, no"? Is that your testimony now? A. Yes, sir.

Q. It wasn't your testimony then; right, because you misunderstood? Okay.

Mr. Kaplan: I object. That isn't what the witness said.

The Court: The jury will take notice of that.

Q. On October 9, 1971, did you assault a person with intent to cause physical injury; October 9, 1971? A. I don't know what you are talking about.

Q. Did you hit someone, beat someone on that date, October 9, 1971? A. October 9th?

Q. You don't remember whether you did it or not? A. I don't remember.

Q. On October 23rd of 1971 did you possess a loaded firearm? A. No, sir.

Q. What is your testimony when you first told Mr. Lombardo about your involvement in this? A. When did you first tell Mr. Lombardo about it? A. When I first told Mr. Lombardo?

Q. Yes. A. I really don't recall telling Mr. Lombardo directly that I was involved. But I remember that when I

Paul Robinson—for Defendant—Cross

was down here on that day, I remember I was to say that I was there before I could give the district attorney the statement.

Q. Did you just testify before the recess that the first time you told Mr. Lombardo about this was on May 31, 1972, when you came to this courthouse on the day that Darian and Mills were to be sentenced? Isn't that what you just testified to? A. I don't remember saying that "we." I don't remember telling Mr. Lombardo that.

Q. Didn't you just tell Mr. Kaplan in response to his question, "When did you first tell Mr. Lombardo about this, and your involvement?"—didn't you just say that you first told him on May 31, 1972, here in this courthouse; isn't that what you said? A. If I had told Mr. Lombardo, it must be on that date. I'm sure that I didn't tell him.

Q. You didn't tell him before; is that your testimony? A. Yes, sir.

Q. And you never told Mr. Lombardo before May 31, 1972, right? A. If I told him on that date, that was the only date I could have told him.

Q. Page 54. Do you remember testifying in this courtroom in answer to this question by me:

"Q. So the first time you ever told Mr. Lombardo that you knew something about this case and that Darian and Mills weren't there was in this building; is that right? A. The first time I knew something about this case."

Do you remember that question and that answer? A. Could you repeat it?

Q. It's really a preliminary question, but I will read it again, if you want.

The Court: Suppose you ask a series.

Paul Robinson—for Defendant—Cross

Q. "Q. The first time you told Mr. Lombardo that Darian and Mills weren't there was here in this building? A. No, sir.

"Q. When was the first time you told Mr. Lombardo? A. Mid-October.

"Q. You told him this story you are now telling? A. I told him that Mills and Darian were innocent."

A. Yes, I told him in mid-October. That's when I went to see him in his office.

Q. Didn't you just say the first time you told him was May 31, 1972? A. You didn't tell me, told him what?

The Court: In October you told him you knew that they were innocent, but you didn't tell him how you knew; is that what your testimony is?

The Witness: I told him that Mills was at the house and in mid-October I told him that he was sick in bed.

The Court: But you didn't tell Mr. Lombardo that you had been present in the park?

The Witness: No, sir.

The Court: The first time you told Mr. Lombardo you were present in the park was on May 31st, if then?

The Witness: Yes, sir.

Q. Okay. When did you first tell him, Detective Iannucilli? A. That I was present?

Q. Yes. A. That was—

The Court: The same day.

A. May 31st. That supposed to be the same time when I told Mr. Lombardo.

Paul Robinson—for Defendant—Cross

Q. I don't know if you are using the words "supposed to be"—maybe there's a language situation.

The Court: The first time you told Detective Iannucilli that you were in the park.

The Witness: That was in this courthouse. Mr. Lombardo was here.

The Court: On the 31st?

The Witness: Yes.

Q. Didn't you just say before that you told Iannucilli, shortly after Mills was arrested, this whole story? A. That I was present?

Q. No, that you knew that Mills wasn't there; didn't you just say that? A. Yes, yes. I told him that.

Q. When did you first tell Iannucilli what you knew about it and where? A. That I was present in the park?

The Court: No, that Mills wasn't present.

The Witness: I told him from the same day he arrested Mills.

Q. You told him that? A. Yes.

Q. And what did you tell Detective Iannucilli when Mills got arrested? A. He came to me and asked and told me that Mills—he asked me if I knew Darian, and I said yes. He showed me a picture, and he asked me if I knew Mills, and I said yes. He said they were arrested for the homicide of one Germain Phillips. Then he asked me if I knew George and Gargo. I told him I saw them a few times.

He asked me—he told me that he knew that I was there in the park that night, and he knew that George and Gargo did it. And if I was to tell him, if I was to find George and Gargo for him, he would make sure guarantee for me that

Paul Robinson—for Defendant—Cross

everything would be good for me, and Mills and Darian would be free.

Q. Detective Iannucilli said he would straighten everything out. How old were you then? A. I am eighteen years old.

Q. How old were you then? A. Sixteen.

Q. And Detective Iannucilli assigned you to go find two killers, right? A. No, he didn't assign me. He asked me if I was to "carry" him, find out where they were, and he didn't know.

Q. Did he deputize you, raise your hand—

Mr. Kaplan: I object.

The Court: Objection sustained.

Q. So Detective Iannucilli, an experienced man, sent this sixteen-year-old boy, who he knew was in the park, out looking—

The Court: Objection sustained. Now, Mr. Davenport, please stop making speeches. Just ask questions.

Q. What did he tell you to do? A. Well, he asked me if I knew where they were, where they were stationed, where they live, and I was questioned like that.

Q. What did you tell him? A. I told him the only place I seen them was in the park at Kingston Avenue and Park Place, and he said that he's going to get me, and all that.

The Court: What?

The Witness: He was going to get me.

Q. He is going to get you? A. Yes.

Paul Robinson—for Defendant—Cross

Q. If you didn't do what? A. If I didn't tell him where George and Gargo was, and then did everything he wanted me to do.

Q. He wanted you to help him find George and Gargo?
A. Yes, sir.

Q. And he threatened you that if you didn't cooperate, he was going to put you in this— A. He didn't say, "Put me." He said he was going to throw the book at me.

Q. And you knew what that meant? A. Yes.

Q. And then from time to time, is it correct, Detective Iannucilli would contact you? A. Yeah, he called me a few times.

Q. And what would he say, more threats? A. He called me up and asked me, "You're on to some information about the two?" I gave him information about Gargo. Well, he came to my house with both pictures, George's picture. He didn't have Gargo's picture at that time. I was the one who helped to get Gargo's picture.

Q. You helped him? A. Yes, sir. He came to my house with George's picture and asked me to identify it. I told him that I wouldn't identify it because I was scared, and like if that was in front of my family, and my big brothers would say that, "If he identified it, who's going to protect him on the street," and all that. And he said, "All right," and left.

Q. Did he make any threats? A. Not at that time, he didn't make any threats.

Q. Well, at that particular time, but he would then call you again, is that right? A. He called me in that same week, he called me about three times, because he had a problem finding Gargo, finding Gargo's body. I was going out and find in which area he was killed, and all that.

Q. When was the next time he threatened you? A. He threatened me two times. He threatened me once when

Paul Robinson—for Defendant—Cross

Mills was in court. And he told me that if that was in front of my mother, he told me one out of seven persons that was busted with Mills said that I was there. He didn't tell me that Mills said that. So if I didn't tell him, he was going to throw the book at me.

Q. If you didn't tell him what, whether or not you were there with Mills? A. And with George and where George and Gargo is.

Q. Again, when was the first time you told Iannucilli, if ever, that you knew Mills couldn't have been in the park because Mills was at 104 Rogers Avenue with you and he was sick?

The Court: That was asked and answered. When Mills was arrested. Isn't that what you testified to?

The Witness: Yes, but I told him that I knew because Mills, that night Mills was sick in bed.

Q. That's what you told Iannucilli the first time? A. Yes, sir.

Q. But obviously Iannucilli didn't accept that version of the story? A. Iannucilli knew before that date that it wasn't Mills and that it wasn't Mills and Darian who committed the crime. He went to Rogers Avenue looking for George and Gargo, and he busted Mills and Mills went to the precinct. And that's when Greene identified him. He said he was one.

Q. Okay. Let's go back to the night in question. What time did you get to the apartment at 104 Rogers Avenue? A. About eight-thirty.

Q. And when you got there, who was there? A. When I got there, Mills was there.

Q. Anyone else? A. A lot of other fellows was there.

Paul Robinson—for Defendant—Cross

Q. But you don't know their names? A. Once I could recall.

Q. Was George and Gargo there yet? A. George and Gargo, I think they were there at that time, because they were card-playing around the back.

Q. About what time was it that you left the apartment? A. About 11:25, sometime around going towards midnight.

Q. When you left, had George and Gargo left, or were they still there? A. They were still there.

Q. How many blocks is it to the subway that you were to take? A. Well, the subway is located at Eastern Parkway and Nostrand Avenue. The house is located on Rogers Avenue, which is one block from Nostrand Avenue, Rogers Avenue between Sterling and Park Place. There's three, there's Lincoln, St. Johns, Sterling and Park, away from Eastern Parkway. That's one block away from Nostrand Avenue and three blocks, approximately three blocks away from Eastern Parkway.

Q. Is it a three-block walk? A. Approximately a three-block walk.

Q. They were there when you left, but somehow you came together again? A. Yes.

Q. You got on the subway? A. Yes.

Q. You rode to Utica Avenue, and you got off at the front, right, and you got out of the subway; am I right so far? A. Yes, sir.

Q. And you heard the music and you went over to the park, the three of you together? A. Yes, sir.

Q. And it was crowded, and somehow you lost contact with them; am I right so far? A. Yes.

Q. But somehow you got together again, the three of you met together again? A. Yes.

Q. Is that correct so far? A. Yes, sir.

Paul Robinson—for Defendant—Cross

Q. And then you walked along the path, and Germain Phillips and the young man, Mr. Greene, were there on that path, and that encounter occurred; am I stating it correctly so far? A. Yes.

Q. And then the shooting occurred? A. Yes, sir.

Q. At the point in the park where the shooting occurred—where is your home located? A. It was located in the direction that I was going to.

Q. On that path, right? A. Yes, sir.

Q. And you would have proceeded on that path to get to your home? A. Yes, sir.

Q. Now, the shooting occurred. People start to disperse. Where did you go? A. I stopped.

Q. No, no. After the shooting. Oh, you stood there? A. After the shooting?

Q. Yes. A. After the shooting, I ran in the direction of my home.

Q. Along the pathway? A. Yes, I ran along the pathway.

Q. You didn't cut through some soccer field or something? A. No, at that time I ran straight, I went where—if I cut through the soccer field, I would have dropped the same way, but it was different routes.

Q. You didn't cut through the soccer field? A. I run along the soccer field about two yards. The fence separates the soccer field from the parkway, and I run along the fence.

Q. Let me read these questions and answers, page 88:

"Q. Is there a path that would get you that way or did you have to cut through the basketball court and then this soccer field, or whatever? A. No, there's no basketball field or soccer field.

"Q. You were going on a path? A. Yes.

Paul Robinson—for Defendant—Cross

"Q. That would lead you directly to what, Rochester and Utica? A. Yes, sir.

"Q. If you cut through the soccer field, wouldn't that get you out on East New York? A. It would get you to the same exit that the parkway would get you to.

"Q. And is the soccer field a shorter way to do it than the way you are now telling us you did it? A. A shorter way to get out of the park?

"Q. Yes. A. No, it's a long way."

Is it your testimony—

Mr. Kaplan: Wait—

Q. Did I ask you those questions? Do you remember being asked those questions and giving those—

Mr. Kaplan: Give the rest of the answer.

Q. "A. It was a longer way, but I was going to my getting out of the park. It's a shorter way, but getting to my house—getting to my house, it's the same distance. It's the same distance, but you're more going to my house walking more in the direction that my house is all the same; instead of going that way and cutting that, way, you would be going straight towards my house all the time.

"Q. Which way?

"The Court: Through the soccer field?

"Q. Through the soccer field? A. Yes.

"Q. So you took a long way to get out? A. It's not a long way. It's just a different direction."

Do you remember being asked those questions and giving those answers? A. Yes.

Paul Robinson—for Defendant—Cross

Q. Which way on the path did you go, or through the field? A. To get to my house?

Q. After the shooting. A. On the path.

Q. And that got you directly to your house, right? So you left the—

The Court: You didn't go to your house, you went back to Rogers Avenue?

The Witness: Yes.

Q. So you took this path that would get you directly to your house, right, and you came out on the street? A. Yes, sir.

Q. And what street were you at when you came out from the park? A. Rochester Avenue.

Q. And where do you live? A. East New York Avenue. East New York and Schenectady.

Q. How far is Rochester Avenue from East New York and Schenectady? A. Rochester intersects with East New York.

Q. So when you got out of the park, how far were you from your home? A. I was—there's Rochester, Utica and Schenectady.

Q. How far were you from the subway? A. From the subway I would have to pass Carroll, President, Union, Eastern Parkway, and then one block east to Utica.

Q. Did you elect not to go home? A. I reached one block from my house.

Q. And you changed your mind and decided not to go home?

The Court: Did you go back by subway to Rogers Avenue?

The Witness: Yes, sir.

Paul Robinson—for Defendant—Cross

Q. And did you had to go back to the subway? A. Yes, sir.

Q. And you waited for the subway, and you got back? A. Yes, sir.

Q. When you got back, West opened the door? A. Yes, sir.

Q. And West went back to sleep, and you and Mills sat down and had a conversation? A. I don't know. West went to the back of the house.

Q. At some point, you and Mills sat down and had a conversation? A. Right. I went and woke him up.

Q. And you related to him what occurred, okay? A. Yes, sir.

Q. Now, you sat here during Mills' testimony. You and Mills agree on everything except two things, it seems. Number one, that you left with George and Gargo, and you say that you left before, shortly before, but you caught up with them. A. Right. Mills say that I left?

Q. Mills said you left with them. Is that right? A. Yes, sir.

Q. That you disagree with? A. Yes, sir.

Q. Mills says that you returned with George and Gargo. A. Yes, sir.

Q. That you disagree with? A. Yes, sir.

Q. But everything else that Mills says is correct, that you told him what happened, that you differ on what was said? A. Yes, sir.

The Court: Was Mills cooking before you left?

The Witness: No, Mills was sleeping.

The Court: Before you left?

The Witness: No.

Paul Robinson—for Defendant—Cross

Q. When you left the apartment at 104 Rogers, was he cooking? A. No, sir.

Q. He was not cooking? A. No, sir, he was laying down, and he said he wanted us to—he said he wanted to sleep, that's why we left. He had a cold, a chest cold, and it was stuffed up, his nose.

Q. What do you mean when you say you were going to watch the prostitute? What is that? Is that a kind of sport you guys engaged in? A. It was just, well, kind of indecent, but there's a lot of jokes about it.

Q. You were just going to watch them ply their trade? A. Well, I used to play the same place where the homicide happened on the basketball court. That's where I played baseball mostly. And like in the nights, well, see a lot of prostitutes and pimps were down there, so we were playing basketball and laughing.

Q. So that you really believed that when George and Gargo said, "Let's go look for some pimps and prostitutes," it was just going to be some X-rated movie for you; you were just going to watch what was going on; that's what you took those words to mean? A. Yes. But they didn't say, "Let's go look for"—

The Court: Look at?

The Witness: Yes.

Q. That's what you say they said? A. Yes, sir.

Q. And you thought the three of you were just going to relax after the concert and watch them fool around, right?

A. Yes, sir.

Q. And that you never said to Rudolph Mills, your friend, "We're going to get some money"? Mills is lying about that?

A. Yes, sir.

Paul Robinson—for Defendant—Cross

Q. Isn't it a fact that Mills, the day he was arrested, told the truth and that you lied to Iannucilli? Isn't that a fact? You didn't tell Iannucilli the truth the first day, that you were there, did you? A. Mills' statement could prove to you that he is lying.

Q. Isn't it a fact that you lied to Iannucilli the first day he spoke to you when he asked you what you knew and you didn't tell him that you were there? A. Yes.

Q. You lied, didn't you? A. Yes, sir.

Q. And isn't it a fact that you lied to Mr. Lombardo every time you spoke to him— A. No.

Q. —until May 31st? A. No, I didn't lie. He didn't ask me no question about it, so why should I lie?

Q. You told him that Mills was home, but you could give him an alibi; isn't that what you told him about it? A. I didn't told him about no alibi. There wasn't no alibi.

The Court: Did you tell both Mr. Lombardo and Iannucilli that you were with Mills at Rogers Avenue at the time of the incident?

The Witness: No, I didn't tell him that I was there at the time of the incident. I told him that Mills was sick in bed at the time of the incident.

Q. You didn't say that you were with him? A. At the time of the incident, I didn't told Mr. Lombardo that.

Q. Did you and West ever go to Lombardo's office and tell him precisely that, that Mills couldn't have done it because he was at 104 Rogers Avenue at the time with you? A. That's where I carried West, because West couldn't have proved it.

Q. And that's what you told Lombardo when you went to his office? A. West told him that.

Paul Robinson—for Defendant—Cross

Q. And you were sitting there?

Mr. Kaplan: I object to that.

The Court: Please, just ask questions and don't argue.

Q. You were sitting there when West told him this story?

A. Yes.

Q. And West told him the story that you and Mills—

A. No, West didn't tell him that story. West told him that he was in the house all that time when the incident was supposed to have happened.

The Court: That he was with Mills in the house.

Q. And that you were with him; isn't that what you told Lombardo? A. I didn't tell Mr. Lombardo that I was with Mills at the time of the incident. I told him I was at the house that night.

Q. And Mills was at the house? A. Yes, sir.

Q. And West was at the house? A. Yes.

Mr. Kaplan: I object, your Honor. It is not the witness's testimony.

The Court: As I understand the witness now, you went to Lombardo's office with West, is that right?

The Witness: Yes, sir.

The Court: And West told him in your presence that Mills and West were at the house?

The Witness: That Mills told him in my presence?

The Court: That West told Mr. Lombardo that West and Mills were at Rogers Avenue.

The Witness: Yes, sir.

Paul Robinson—for Defendant—Cross

The Court: And you said nothing, you said that you had been there at Rogers Avenue?

The Witness: Yes, sir.

The Court: But you didn't say you were there at the time of the incident?

The Witness: No, sir.

The Court: And you weren't asked that question?

The Witness: No, Mr. Lombardo didn't ask.

By Mr. Davenport:

Q. So therefore you felt no obligation to say anything?

A. I was the one who went for West.

Q. You brought West out? A. Yes, I went from after school, I left school. I went for West and—

Q. So you were going to have West tell Lombardo some story which you knew was untrue? A. It wasn't untrue. Mills was at the house and West was asked about the house.

Q. Oh, I see, you are right.

So you were going to have West be the alibi for Mills?

A. It wasn't an alibi. It was the truth.

Q. An alibi is not an untruth, but I recall we went through this before when you misunderstood what alibi is.

The Court: And I will tell the jury, an alibi is not an untruth. It means "elsewhere."

Q. So you were going to have West alibied for Mills?

A. Yes.

Q. And you figured that will help get Mills out, right?

A. That would be able to do it.

Q. You weren't going to tell the truth about your being there, right? A. No, sir. The detective—I couldn't tell Iannucilli that. Iannucilli had showed me his character when

Paul Robinson—for Defendant—Cross

he arrested Darian and Mills, what kind of person he was.

Q. And he was a pretty rotten person, wasn't he? A. Yes.

Q. And you sat by, letting Mills sit in jail, knowing he wasn't even there, and you remained silent from August until May, and you never said a word, knowing Rudolph Mills is charged with the heinous crime of murder and is sitting in jail, and you say that Iannucilli showed you what kind of character he had? A. Iannucilli knew that they were innocent, and he arrested them.

Q. And Iannucilli worked for nine months on you?

Mr. Kaplan: I object.

The Court: Objection sustained. Now, I warned you about that, Mr. Davenport, please.

Mr. Davenport: Your Honor, if I can't ask, he can't answer.

By Mr. Davenport:

Q. You sat silently by, didn't you, you didn't say a word from August 18th, when Rudolph Mills was arrested until May 31st, when Rudolph Mills was about to be sentenced for murder, isn't that right? You didn't say a word to Iannucilli; you didn't say a word to anyone, did you? A. No.

Q. And the night of the crime, when you were an innocent victim, almost a witness, you didn't help Mr. Greene, did you, when that girl was shot? A. I did the best I could.

Q. You ran back to 104 Rogers Avenue; is that the best you could have done? You didn't even go home.

Mr. Kaplan: I will object, Judge.

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Paul Robinson—for Defendant—Cross

The Court: Objection sustained. If you ask a question, wait for an answer.

Mr. Kaplan: Do you want to give an answer, Mr. Robinson?

A. I was scared. I wanted West to relate the story to somebody.

Q. How old were you then? A. Sixteen plus.

Mr. Kaplan: No further questions.

The Court: You may step down.

(Witness excused.)

Summation by Mr. Davenport

Members of the jury, George and Gargo didn't bring a witness, they brought a participant, they brought someone to act in concert with them, they brought someone that worked together with them who is as much a part of this crime as the one that held the knife, as the one that held the gun.

If you believe that, just because he was sixteen years old at the time that he should not be found guilty, then I think you make a serious mistake, because that's the only thing that stands in your way. You make a mistake because, don't have sympathy, don't have prejudice, but don't have sympathy just because he is sixteen years old. Don't have sympathy for that girl who died because of her age. She is dead. She was murdered. She was murdered during the course of a robbery.

Don't feel that you have to find someone guilty, but don't believe that you must acquit just because he is sixteen years old. The law permits us to try him. The law demands that we try him. And you sit in that jury room and ask yourself that question over and over and over again, would George and Gargo take a witness with him, would you take a witness?

(At this time there was a fifteen minute recess.)

JURY CHARGE

The Court: Mr. Foreman, gentlemen of the jury, I have been admonishing you not to form any opinions or discuss the case until I have instructed you on the law. I am about to do that. And when I get through, you will be able to form your opinions concerning all of the facts in the case, the credibility of the witnesses and the innocence or guilt of this defendant, and it will be your duty also to exchange

Jury Charge

your views with your fellow jurors, tell your fellow jurors what you think, why you think the way you do, and listen to what your fellow juror says, because, ladies and gentlemen, in criminal cases you must agree upon a verdict, the twelve of you must agree.

In civil cases you may return verdicts of eleven to one, ten to two, but in criminal cases it is twelve to nothing. So form your opinions, as I say, but listen to the opinions of your fellow jurors. Don't go into the jury room and say, "well, this is the way I feel and nobody is going to change my mind."

A rational man talks about the case rationally. If you think that you are right, try to convince your fellow juror. If you think that he would be right, be willing to be convinced by him, but don't give up something that you firmly believe in.

The alternate juror will not take part in your deliberations, but he will remain here in the other room.

In the event he should be called upon to replace another juror, the first alternate juror having replaced one of you this morning. So, as I say, take the case, talk it over with your fellow jurors, listen to them and they can listen to you.

What do we have here, gentlemen? We have a law suit just like any law suit which is brought into this court. It was started by the filing of a complaint. In a criminal case we call it an indictment, but it is a complaint just like in a civil case.

If you want to sue me for some money, you would go to a lawyer and you would tell him that I borrowed some money from you and I didn't pay it back, or perhaps I had run into your automobile and damaged it and caused personal injury. And your lawyer would listen to what you

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tell him and he would draw up a complaint along those lines and serve a complaint upon me, together with a summons.

It may well be that I never borrowed money, or perhaps I did borrow money from you and I didn't pay it back, or I did pay it back, or you didn't get a receipt. Perhaps you thought you had a chance to collect twice. So the fact that you say that I owe money to you does not make that a fact.

The automobile case, instead of my running into your automobile, you might have run into my automobile and you might have thought that the best defense was an offense, so you would sue me before I had a chance to sue you.

After I was served with a copy of your complaint, I would file an answer to it, and the case would be brought into Court and a jury would decide whether I owed money that I had borrowed or whether I had owed money as a result of the accident.

The criminal case is brought into Court in the same way, except that instead of going to a lawyer, witnesses go before a Grand Jury and tell their story before the Grand Jury. This is under oath, it is true, but the defendant is not present. His lawyer is not present and the witness is not cross examined, any more than you would be cross examined by your lawyer.

And after the Grand Jury listens to the testimony, they will decide whether a complaint should be filed or whether it should not be filed. And in this case they decided that a case should be filed, draw up what we call a true bill. And the indictment was drawn and the indictment reads as follows, gentlemen: There were six counts in this indictment, but I have spoken to the lawyers and I have taken three of those counts away from you.

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The first count which you can forget about charges the crime of murder and it is what we call a common law murder. And there is no proof here that this defendant or anybody intended to kill Germaine Phillips. So I am taking that away from you. And I am also taking away the third and fourth counts of the indictment which charge the attempted robbery and attempted grand larceny of property from Germaine Phillips. There is no proof in this case that anything was taken from Germaine Phillips at all, any property taken from her, but there is some testimony that there was an attempt of robbery, and attempted grand larceny from Alberto Greene, so I am submitting the three counts to you. And I will read the first count which you will consider. It is the second count of the indictment.

Second Count: The Grand Jury of the County of Kings, by this indictment, accuse the defendant of the crime of murder, committed as follows:

The defendant being aided by other persons actually present on or about August 13, 1971, in the County of Kings, having attempted to commit and having committed the crime of robbery, and in the course of and in furtherance of such crime and immediate flight therefrom caused the death of Germaine Adiana Phillips, she being other than a participant, by means of a deadly weapon to wit: a loaded fire arm, the exact nature of which is unknown to the Grand Jury, thereby inflicting diverse wounds and injuries upon Germaine Adiana Phillips, and thereafter on or about August 13, 1971, the said Germaine Adiana Phillips died of said wounds and injuries.

And the fifth count reads:

The Grand Jury of the County of Kings by this indictment accuse the defendant of the crime of attempted rob-

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bery in the first degree, committed as follows: The defendant acting in concert with and being aided by other persons actually present, on or about August 13, 1971, in the County of Kings attempted to steal forcibly certain property from Alberto Greene, to wit: a quantity of property. And in the course of the commission of the crime and the immediate flight therefrom, the defendant and the aforesaid other persons were armed with a deadly weapon, to wit: a loaded fire arm.

Sixth Count: The Grand Jury of the County of Kings, by this indictment, accuse the defendant of the crime of attempted grand larceny in the third degree committed as follows:

The defendant, acting in concert with other persons actually present on or about August 13, 1971, in the County of Kings attempted to steal and take certain property from the person of Alberto Greene, to wit: a quantity of property.

And the indictment in this case was signed by Eugene Gold, the District Attorney, just as the complaint in your civil action against me would be signed by your lawyer.

Instead of my filing a written answer, as I would do in a civil case, the defendant came into Court and this indictment was either read to him or his lawyer waived the reading, but in any event he said, "I am not guilty." He was asked, "How do you plead," and he said, "I am not guilty."

And gentlemen, when he uttered those words, a mantle, a cloak, if you will, invisible but very substantial was thrown about his shoulders. And from the moment he uttered those words up to this very moment, the defendant is presumed to be not guilty. And that presumption still cloaks him and will continue to cloak him when you go into your jury room.

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And unless you are satisfied beyond a resonable doubt, the presumption of innocence, the presumption of his being not guilty, unless that has been rebutted, you must return a verdict of not guilty.

Now my view, the law does not say that the defendant in a criminal case is innocent, it says, he is presumed innocent, and that's what you gentlemen have to decide, has that presumption been overcome, because if there isn't, there is nothing to decide. The law says he is presumed innocent.

You can only decide that he is not innocent, that he is guilty, if you are satisfied beyond a reasonable doubt that he is guilty.

A reasonable doubt gentlemen, those words mean exactly what they say. There is nothing legalistic or mysterious about the words. A reasonable doubt is a doubt that a reasonable person could have after considering all of the evidence in the case. It is a doubt that is founded on reason, grounded on reason. It is a doubt, as I say, which you can justify reasonably.

You should tell your fellow jurors why you have such a doubt. You may have such a doubt, even if you cannot articulate why you have a reasonable doubt. But if you cannot give at least yourself a reason for the doubt, then it is an unreasonable doubt, and the law does not prove him guilty beyond an unreasonable doubt.

The man's proof of guilt is to a moral certainty, but not to a mathematical certainty. Do you understand, gentlemen, the presumption of innocence and reasonable doubt?

If you are not satisfied beyond a reasonable doubt that the presumption of innocence has been overcome, you must return a verdict of guilty.

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On the other hand, if you have no reasonable doubt as to his guilt, you must say so by your verdict. In other words, you are not to seize upon those words, reasonable doubt, as an excuse for a failure to perform an unpleasant task. Do you understand?

As I say, that's the way it is brought into Court. The indictment is proof of nothing. It is merely for the purpose of telling the defendant what he is charged with, telling the District Attorney what kind of case he must try, telling you and me what kind of a case you must listen to.

And the People have the burden of proving the defendant guilty beyond a reasonable doubt except to what we call an affirmative defense, which I will get to you later.

What did the People have to prove in the homicide, the murder case? The first thing they must prove, as Mr. Davenport told you, is that we did have a homicide. And a homicide, gentlemen, means conduct which causes the death of a person.

In other words, death at the hands of somebody else as distinguished from an accidental death or a natural death, a conduct which causes the death of a person. And the law also states that a person in referring to a victim of a homicide, means a human being who has been born and was alive. So the People call as a witness, Mr. Ralph Phillips, the father of Germaine who testified that he was the father, that he had seen her on the twelfth, I think it was, and she was in good health. And then on the following day he saw her body in the morgue.

And Patrolman Goodwin testified that he responded to Lincoln Terrace Park wherein somebody had been taken to Brookdale Hospital, and there he saw the body of Germaine

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Phillips. And then the next day he also saw the body of Germaine Phillips at the morgue.

Dr. DiMaio testified that he is the Deputy Chief Medical Expert in the County of Kings and that he is in charge of the autopsies at Kings County, that he did not participate in the autopsy, but the record of the autopsy was conducted by a physician who is no longer on the staff and another physician who is unavailable at this time, both conducted the autopsy together and made a report, and from the records it appears that Germain Phillips died of a gunshot wound, as you heard, through the face and head, causing massive hemorrhage and her death.

First, the People must prove that a homicide took place. And then comes the question of, what kind of a homicide was it, a murder, was it a manslaughter, and the law provides, gentlemen, that a person is guilty of murder when, acting alone or with one more other person, he commits or attempts to commit robbery, and in the course of and in furtherance of such crime or immediate flight therefrom, he or another participant, if there be any, causes the death of a person other than one of the participants.

In other words, it doesn't have to be an attempt to cause any death. If death results in the commission or the attempted commission of a robbery, then you have a murder. In order to sustain that, the People call Alberto Greene, who testified that he was with Germaine Phillips in Lincoln Terrace Park. And he told you how three persons came and how he identified two of them as Darian and Mills, but he could not identify the third person.

And as a matter of fact, the defendant in effect said that he was the third person, that he was there. So we do have a question of mistake in identification on the part of

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Alberto Greene. And the defendant said that there was, in effect, an attempted robbery as well. There was a conversation between Gargo and George concerning the holding up of Mr. Greene, whom they didn't know at the time, and Miss Phillips, who they didn't know.

Of course, the defendant states that he was not the participant. I will get to that later. And then Detective Iannuccilli testified that he had been in conversation with the defendant, Robinson, during an investigation, and Robinson kept insisting to Iannuccilli that Darian and Mills were not guilty of this incident because he knew that they were not, but he would never tell Iannuccilli how he knew that they were not.

Then, until December 31st, 1972, when he did tell Detective Iannuccilli and the District Attorney, Mr. Zsuffa, that he was present at the scene. We have Rudolph Mills testify that he was convicted. He was wrongly identified by Mr. Greene.

It was also brought out that when he was first arrested he told Detective Iannuccilli that he was not present, that it was Gargo and this defendant and George who were the perpetrators.

And Mills testified that the three of them were on the premises, 104 Rogers Avenue, before the incident. And then he spoke to the defendant after the incident.

We also had the defendant's witness, Barry Agulnick, who was the District Attorney who prosecuted Darian and Mills, Joseph Lombardo who represented one of them, who testified as to speaking to the defendant on the 31st of May. So that's more or less the evidence in the case.

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There is no question about it, there was no completed robbery here. But the law provides that we can have felony murder in the attempt to commit the robbery.

First, we will have to decide, what is a robbery. I think the first way of doing it would be to tell you about the last count of the indictment, the attempted grand larceny in the third degree. Gentlemen, I don't think I have to define larceny for you. Long before we had a State of New York or even a United States, one of the commands that Moses gave was: "Thou shalt not steal." And larceny is stealing.

And then we provide for various degrees. We call it larceny, in the State of New York, but larceny is just taking something that belongs to somebody else, without his permission and intending to deprive him of it. And the law provides that a person is guilty of grand larceny in the third degree when he steals property and when the property, regardless of its nature and value, is taken from the person of another.

Some larcenies, if property is not taken from the person, the value of the property is an element. But when taken from the person, regardless of the value, it would be a larceny in the third degree. There is no contention here that there was an actual stealing, but there was an attempt to steal.

And then we come to the robbery. And the law provides that, gentlemen, robbery is forcible stealing. And a person forcibly steals property and commits robbery when, in the course of committing a larceny he uses or threatens the immediate use of physical force upon another person for the purpose of, one, preventing or overcoming resistance to the taking of property or to the retention thereof immediately after taking.

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Or, too, compelling the owner of such property or another person to deliver of the property or to engage in other conduct which aids in the commission of the larceny.

Do you understand the difference? The larceny is the stealing. The robbery is the use of force to accomplish the stealing.

In other words, gentlemen, a pickpocket who steals your wallet does not use force. He doesn't even want you to know he is lifting your wallet. He only commits a larceny. But if he holds you up and takes it from you against your will by the use of force or the threatened use of force, then he commits a robbery.

As I say, there was no contention here that the defendant or anybody succeeded in committing the larceny, and it was an attempt. And the law reads, gentlemen, that a person is guilty of an attempt to commit a crime when, with intent to commit a crime he engages in conduct which tends to affect the commission of a crime.

In other words, you have to have a little more than the intent to commit the crime, you must do something to affect the commission of that crime, but you are thwarted in the commission of the crime by something beyond your control.

If you try to commit the crime and you do not succeed, then you are guilty of an attempt. And that is the charge here. The defendant testified, as I said, that he was in the park, that he was at 104 Rogers Avenue early with George and Gargo. They left separately. And he happened to meet them on Nostrand Avenue. And I think he said, Lincoln Place, which was a block from the Eastern Parkway subway station. And they took the subway down to Utica Avenue. And they decided to go to the park to hear music

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on Utica Avenue and Eastern Parkway emanating from the park a block away at Rochester. So they went down there.

They separated and found each other again. And he did not know that they were going to go into any—try to commit any robbery, and in effect, he was not acting in concert with them.

Mr. Davenport stressed the words, "acting in concert." And I might tell you that those words mean exactly what they say.

Let's suppose, gentlemen, you go over to Lincoln Terrace. There is an orchestra over there. And you go to witness a concert. You take your seat. You sit down, and the conductor comes out and starts waving his baton, and there are fellows playing the piano and another on the drum and others playing on brass instruments and others playing strings. And the conductor leads them and he indicates when they should play, in part, and when they should all join together. And they all participate. And at the end of the number, if you like it, you applaud, and so forth. All those musicians were acting in concert. Even the fellow over in the far right who just sat there who had a triangle in his hand and a hammer in his other hand, and maybe once or twice during the whole number he would hit the triangle. And music came from that. He was just as much part of that concert as any other musician as the one who made the most music during the rendition, or even as much as the conductor who lead them. He participated. He was part of that concert.

On the other hand, gentlemen, you were there. You were sitting. You were listening. You were not participating. What I am trying to impress upon you, gentlemen, is that the mere presence at a concert does not make you a partici-

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pant in the concert, nor the mere presence at the scene of a crime does not make you a participant in a crime. That's what you gentlemen have to decide.

Was this defendant present at the scene of the crime or was he a participant in the scene of the crime. The law provides, gentlemen, that one person engages in conduct which constitutes an offense, another person is criminally liable for such offense when, acting with a mental culpability required for the commission thereof, he intentionally aids such person to engage in such conduct.

Juror: Could you please repeat that part about mental what? I didn't hear the second part.

The Court: When a person engages in conduct which constitutes an offense, the other person is criminally liable for such acting in concert when, acting with the mental culpability required for the commission thereof, he intentionally aids such person to engage in such conduct.

Now, I will go on to define mental culpability for you. And the law reads, a culpable mental state, that means intentionally or knowingly aided, knowingly, intentionally, and of course the law states that a person acts intentionally with respect to a result or conduct described by statute defining an offense when his conscious objective is to cause such a result or to engage in such conduct.

Further, a person acts knowingly with respect to conduct or to a circumstance described by a statute defining an offense when he is aware that his conduct is of such nature or that such circumstance.

In other words, intent is an operation of one's mind. We cannot see a person's intent. We cannot touch it or experience it through any of our senses. We must infer

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what a person's intent is from all surrounding circumstances.

Let's assume I go home tonight and I find I have forgotten my keys. I ring the doorbell, and perhaps my wife might be asleep or maybe the doorbell does not ring and I get a little annoyed. So I start throwing pebbles at the window trying to attract her attention. And maybe one of those pebbles was a little larger than I thought it was or perhaps the window was a little weaker than I thought it was and one of the pebbles breaks the window. You cannot infer from that that I intended to break that window.

But let's assume that after I threw some pebbles at it, after a while I pick up a rock and I let this rock go through the window. And you may infer from that that I was annoyed and I intended to break that window.

You have to determine a person's intent, as I say, from all of the circumstances in the case. The defendant not only says that he was not there—excuse me. The defendant says he was there but he was not a participant in the crime. He goes further than that. He has interposed what we call an affirmative defense.

The People have the burden of proving the defendant guilty beyond a reasonable doubt except in certain instances, and I read to you the section about a person being guilty of a murder when, acting alone or with one other person he commits or attempts to commit robbery and in the course of and in furtherance of such crime or of immediate flight therefrom he or another participant, if there be any, causes the death of a person other than one of the participants.

Then, the law goes on to read, except that in any prosecution under this subdivision in which the defendant was

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not the only participant in the underlined crime, as an affirmative defense, the burden of proving this is on the defendant, that the defendant, one, did not commit the homicidal act or in any way solicit, request, command or importune or aid the commission thereof, and that he was not armed with a deadly weapon or any other instrument, article or substance readily capable of causing death or serious physical injury and of a sort not ordinarily carried in public places by a law abiding person. And that he had no reasonable ground to believe that any other participant was armed with such a weapon, instrument, article or substance and further that he had no reasonable ground to believe that any other participant intended to engage in conduct likely to result in death or serious injury.

I told you that the burden is on the People to prove the defendant guilty beyond a reasonable doubt, but the defendant has the burden of proving all of those elements of his affirmative defense and the burden of proving an affirmative defense rests upon the defendant. That means that it must be established by a fair preponderous of the credible evidence that the claim that the defendant makes is true.

The credible evidence means the testimony or exhibits found to be worthy of being believed. Preponderous means the greater part of such evidence. This does not mean the greater number of witnesses or greater amount of time taken by either side. The phrase refers to the quality of the evidence. That is, its consisting quality. The weight in effect is for you to determine.

The law requires that, in order for a defendant to prevail, the evidence that supports his affirmative defense must appeal to you as more clearly representing what took place

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than opposed to his claim. If it does not and the weight is so evenly balanced that you would be unable to say which evidence has the greatest weight on either side, then you must resolve the question in favor of the People, because it is only if the evidence favors the defendant's claim, the evidence opposed to it, that you can find in favor of the affirmative defense for the defendant. You understand the fact that he has interposed this affirmative defense.

Now, the burden of proving an affirmative defense is, as I say, on him.

The burden of proving that he participated in this crime, that he was acting in concert, is on the People. In other words, if he were there with the intent to commit a crime and participates in it with that intent, then he is guilty, if you are satisfied as to that beyond a reasonable doubt.

On the other hand, if you are satisfied beyond a reasonable doubt that he was there, that he intended to participate, but he did not know that one of his fellow was armed—and there is no proof that he, here, himself committed a homicide—no proof that he was armed, but he must prove that he had no reasonable ground to believe that any other participant was armed and that he had no reasonable ground to believe that any other participant intended to engage in the conduct. The burden of proving that is on him. That's if you are satisfied beyond a reasonable doubt that he was not a mere spectator, if you are satisfied beyond a reasonable doubt that he was not.

So, gentlemen, that's the case as I see it. You have had an opportunity to observe all of the witnesses. You have had an opportunity to determine their truthfulness and veracity. You have had an opportunity to, as I say, observe the witnesses. The law provides, gentlemen, that in my

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charge I must charge you as follows: The jury may not, in determining the issue of guilt or innocence, consider or speculate concerning matters relating to sentence or to punishment.

In other words, gentlemen, you are to tell me what, if anything, happened on August 13, 1971 in Lincoln Terrace Park. Don't let the thought of the effect of your verdict enter into your deliberations. The verdict means, speak the truth, tell the truth. You speak the truth, tell the truth about what happens from all the evidence in the case.

I have no opinion as all as to the innocence or guilt of the defendant, or the credibility of any of these witnesses, at all. I am not permitted to under the law. And I don't.

But if you think that I am a human being and I must have some opinion, if you think you know what that opinion is, disregard it, it is not part of the testimony. Whatever your verdict may be, I am not going to tell you whether I agree with it or disagree with it. I am merely going to thank you for returning a verdict. If you return a verdict that speaks the truth, I am not going to find any fault with it at all.

Gentlemen, I have told you, weigh all the evidence carefully, apply to those witnesses the tests which I have already explained to you. Are they interested parties? I might tell you at this time that the defendant is an interested party. The law says that the parties to every crime are interested parties.

If you were suing me for money, you would be interested in collecting that money. I would be interested in saving that, so the law states that the jury may weigh that interest in evaluating the testimony of a witness.

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That does not mean that, if a witness is interested, he is not telling the truth. Maybe I did borrow the money and you didn't pay it back. So that doesn't mean that you should be disbelieved.

On the other hand, maybe I did pay it back. That doesn't mean that I should be disbelieved because I am a party. The jury may weigh the interest.

The defendant in a criminal case is interested and that interest may be weighed as a matter of law. Now, that does not mean that other witnesses in the case are not interested, because they may be. But that is for you gentlemen who are the judges of the facts to determine.

If you find that any other witness is interested in the outcome, as a matter of fact, then you may weigh that interest in evaluating his testimony. If you believe that any witness has testified falsely as to any material fact in the case, you may disregard the entire testimony of that witness or accept that part which you believe to be true and reject that part which you believe to be false.

Now, continue to consider, do the witnesses have any motive to misrepresent the true version of the facts? Is there testimony suspicious? Is it tainted with falsehood or is it frank and honest? Because it is for you to say whether or not, from all of the circumstances surrounding the alleged commission of the crime, that the prosecution has proved the guilt of this defendant beyond a reasonable doubt. You are the judges of the facts, gentlemen.

Don't have any emotions enter into your deliberations. Do not have any bias or sympathy or any prejudice for or against the defendant or for or against Mr. Phillips or his dead daughter, Germaine Phillips.

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Don't let those emotions enter into your deliberations at all, just return a verdict that speaks the truth and you will be able to sleep tonight.

Are there any questions, Mr. Davenport?

Mr. Davenport: In the affirmative defense charge, your Honor, you left out, if they accept the affirmative defense, then they must therefore find him guilty of something.

The Court: The affirmative defense is, insofar as murder is concerned.

Mr. Davenport: They cannot acquit them of the attempted robbery in the first degree.

The Court: If they are satisfied beyond a reasonable doubt that he was a participant in the attempted robbery, and attempted grand larceny, then they will find him so guilty, but if he has convinced them by a fair preponderous of the evidence that he did not know that this murder was going to take place, and all of the elements in the case, then their verdict must be accordingly.

Mr. Davenport: They must find him guilty of attempted robbery in the first degree.

The Court: If they accept the affirmative defense, if they are satisfied by that by a fair preponderous of the evidence.

Mr. Davenport: I further request that, in order for them to find the affirmative defense, they must find that the defendant intended to commit the crime of robbery or the crime of attempted robbery when he went with George and Gargo into the park.

The Court: Yes, if he attempted to commit the robbery, then the burden is on him of proving that he did not participate in the murder or that he did not know that others were armed, and so forth, as I outlined.

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I don't want to tell you how to decide the case, but first, there was an attempted larceny? And if so, then, was that an attempted larceny by force, to make it an attempted robbery? And then, if you are not satisfied beyond a reasonable doubt as to that, then, of course, your verdict will be not guilty on all counts.

If you are satisfied that there was an attempted robbery, an attempted grand larceny, and this defendant was a participant with the culpable mental state, then the question is, has he prevailed by a fair preponderous of the evidence on his defense of not knowing that the others were armed and had no reason for knowing, and so forth.

If you are not satisfied there, then your verdict must be not guilty. Or if you are satisfied. If you are not satisfied by a fair preponderous of the evidence that he did not comply or prove by a fair preponderous of evidence that he was not participating. That rule may seem a little harsh, gentlemen, but the easiest way to avoid being charged with a felony murder, as we call it, is, don't commit robberies. If you go out and commit a robbery and you know that the other fellows are armed and somebody is liable to get killed, why it is just as bad as if you had pulled the trigger yourself.

Do you have any exceptions?

Mr. Davenport: I have no exceptions.

I hereby certify that the foregoing is an accurate transcript of the minutes taken during the above-captioned proceedings.

NORMAN MYIV
Official Reporter

A173

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Statement of Paul Robinson

STATEMENT NO. 45840

FOLIO NO. 19

STATEMENT TAKEN AT THE OFFICE OF THE DISTRICT ATTORNEY, BROOKLYN, NEW YORK, ON MAY 31, 1972, COMMENCING AT OR ABOUT 12:00 P.M., BY ASSISTANT DISTRICT ATTORNEY PAUL ZSUFFA.

PRESENT: Det. Phillip Iannuccilli
Shield No. 3001
11th Robbery Squad.

Anthony Settineri
Hearing Reporter

PEOPLE'S EXH. No. 2
MAR 22 1973
NORMAN NYRIN
Official Court Reporter
Supreme Court Kings County

PAUL ROBINSON QUESTIONED

By Mr. Zsuffa:

Q. You are Paul Robinson? A. Yes.

Q. I am Assistant District Attorney Zsuffa, I am not a police officer, I am an Assistant District Attorney here in Brooklyn, and you are here today because you are accused of being involved in a murder that took place back in August of 1971, specifically: August 13, 1971. I would like to ask you some questions about that accusation, but before I do, I want to make sure that you understand the rights

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that you have under the law. You don't have to speak to me at all, you can remain silent. Do you understand that?
A. Yes, I understand that.

Q. Now, any answers you give to my questions, may be used against you in court, do you understand that? A. Yes.

Q. You have the right to have an attorney here with you, while you are being questioned. Do you understand that?
A. Yes.

Q. If you wish to speak to a lawyer or to have one here with you now and you don't have one, or you can't afford one, one will be provided for you free of cost, do you understand that? A. Yes.

Q. Now, although you answer some questions I ask you, you can stop answering questions at anytime, and just terminate this whole conversation, do you understand that?
A. Yes.

Q. You do? A. Yes.

Q. Now that I have told you these rights that you have, are you willing to talk to me about August 13, 1971 about what occurred, without having an attorney here with you today? A. Yes.

Q. Now, do you recall where you were on the early morning hours of August 13, 1971? A. What date, what took place?

Q. Let me put it this way, do you remember being in Lincoln Terrace Park, that is in the vicinity of Buffalo and East New York Avenue, here in Brooklyn back in August 1971, at about 12:30 in the morning? A. 12:30 in the morning? Yes, I would be there.

Q. Do you remember if that was August 13? A. I don't remember the exact date.

Q. All right, do you recall the evening that you were in

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Lincoln Terrace Park or the early morning that a shooting took place? A. Yes.

Q. You do? A. Yes.

Q. Now, who was with you in the park at that time? A. Gargo and George.

Q. Now, how long had you known Gargo before that night in the park in August? A. I got to know him about a week or two, before over here in the park at Kingston Avenue. They used to be over there.

Q. Now, you knew both of them for about a week or did you know George longer? A. They came over the park, about, I think, I think George came a few days before Gargo.

Q. All right, I am going to show you a photograph, this is a forensic technician's photo, it is a Morgue photo and it is dated January 9, 1972, which has a visible number of 687, I show this to you, do you know who that is? A. That is Gargo.

Mr. Zsuffa: It is a picture of a deceased male Negro with blood running down the side of his face with the number I described.

By Mr. Zsuffa:

Q. Now this photograph that you have looked and identified as Gargo, is this an accurate representation as to the way he looked like in August of 1971? A. Yes, one of his eyes was like fogged but you couldn't tell the difference.

Q. Which eye, do you recall which eye of his was fogged or had something wrong with it? A. I don't remember which eye it was. He wore glasses sometimes.

Q. And on this night in August that you were in the park, did Gargo have a beard? A. Yes.

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Q. Yes? A. Yes, it wasn't as big as what it was.

Q. All right, now I want to show you another picture, this picture bears no identification except it is numbered #3, I am going to ask the detective Iannuccilli to mark this with his initials and also the name or whatever name is given here. Do you want to look at this photograph and tell me if you recognize that person? A. Yes.

Q. Who is that? A. That is George.

Q. Do you know George's last name? A. No.

Mr. Zsuffa: As far as the record is concerned, I have received from Det. Iannucilli, photograph just identified by Paul Robinson, as George, is actually a photograph of one Glen Ford Jackson, and this photo is now initialed on the back with the initials P.I. and the name George.

By Mr. Zsuffa:

Q. Now, is that photograph an accurate representation of what George looked like on that night in August, in the park? A. Yes, except the only thing, he was a little bit older.

Q. So you would say this photograph was taken when George was younger? A. Yes.

Q. I am going to show you another photograph now, a photograph of one marked with a number of 872264, look at this photo, do you know who this is? A. Yes.

Q. Who is that? A. That is Mills.

Q. Now, was Mills in the park with you that night? A. No.

Q. Was Mills present when any kind of shooting occurred in the park? A. No.

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Q. Now, I am going to show you another photograph, this bears a number, 846025, do you recognize this individual?

A. Yes.

Q. Who is that? A. That is Darian.

Q. Now, Glen Darian, was he present in the park when the shooting occurred in August? A. No.

Q. How long have you known Glen Darian? A. Ever since I came to this country.

Q. How long is that? A. Let me see, I knew him from, I knew him from two and a half years.

Q. And how long have you known Rudolph Mills? A. Well, like I knew him, two, I knew him about a month and a half before the incident happened.

Q. Now, this incident that happened, now did this incident occur in the Lincoln Terrace Park? A. Yes.

Q. Now, who was with you, just prior to the time this incident occurred? A. George and Gargo.

Q. Now, what was the reason that you were in the park at that early hour of the August morning? A. Well, I was on my way home, I was going to the subway station, and like I saw them, they was coming, I started coming behind me and so I stopped and they came in the train station with me, so I took the train to Utica Avenue, and I was on my way home. I came off at Utica Avenue and like from there was a concert, they told me there was a concert over at the park. The park was one block, it is two blocks away from our house, and so I walked from the top of the park right down to the park. I stayed over there for about, say half an hour, 15 minutes to a half an hour like it was All American concert, and I walked down to the bottom of the park like George and Gargo were still there, walked I was going to walk to the football field and I went to the hole in the wire and I was going to my house and I would be nearer

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to my house that way and Gargo and George came on the football field. They said there were going too, they didn't say they were going to rob, they said they was looking for a pimp and his prostitute so the girl, the girl and the guy standing up against the wall, you know, at the back of the field, so seeing a pimp and this prostitute, like I went to look and I went to look and I passed they was in back of me, George and Gargo was about, they was behind me and like, I remember when George reached in front of the guy, he pulled the gun and said, told him to give up everything that he had. The girl, she took steps that led up to about two yards away, two and a half yards away from where they were. George was in the middle with the gun pointing at the witness, and Gargo was about two feet away, and on the left side. Well, the girl was about two yards away and on the right side and I was about a yard and half or a yard away from the girl on the right side. Well like, Gargo, the guy started, I heard him say something like, take it if you want, come on take it or, I know, I remember, I didn't hear what he said, but, well, Gargo called George, Gargo had a knife in his hand. Gargo said to George, move and let me cut him, so he cursed a Jamaican bad words. That is all the witness got. was to know that they was Jamaican, so he cursed in Jamaican and the guy like put one of his hands behind him, like he was going into one of his pockets so George took about, he took about two steps backward, George did and about one step to his left side, so the guy like, like the guy put his hand to his pocket, I don't know if he was going to hold on to his money or he was going for a weapon or what. I heard the gun, didn't fire, like it just clicked and if the girl was to run she would have, she could have run, but she didn't want to run and leave him, the witness, so when the gun went click, like she went to hold

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on to him to hug him and like a shot fired. A shot fired and they went, got direct close to him and then a second shot fired and I heard her scream, George and Gargo run up the steps. I ran on to the other side of the park, I started to go to my way home. I reach one block away, I reach Utica and East New York Avenue, then I turned back and went back to the house where Mills was, Mills was sick at that time, he had a Flu and that, if I didn't tell the whole story, I would only cause trouble for Mills and cause trouble for myself and Mills because if everyone else would say that, will say it, that I informed and that I informed, so maybe they could get out of jail and get killed.

Q. Let me ask you this, was Glen Darian and Rudolph Mills there when the shooting took place? A. I didn't know Darian was, but I know that Mills was at the house.

Q. Now, when you were with them, just Gargo and George, did you know either one of them had a gun or knife? A. No, I didn't know, I was on my way home like I said, and even if one of them was to make a robbery, why would I go two blocks from my house to a park where everybody knows me.

Q. Now, you said after the two shots were fired, did you say that you went in a different direction from George and Gargo that the way they went? A. Yes, in a different direction, they went up the steps and I ran along to the baseball field and I jumped over the fence. I jumped over the fence, I ran over on Carroll Street, and I went on to the Avenue. I don't remember what name of the Avenue, but it carried, it could carry you to East New York and Montgomery Street. I walked on to the East New York, all the way to where the White Castle was. I turned back and took a train and go back to the house and told Mills what happened. He knows the whole story.

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Q. Now, when you told Mills what happened, who was there with Mills, was Darian there? A. No, Darian wasn't there.

Q. Now, when was the last time you saw George? A. Last time I saw George was, this time it happened.

Q. You haven't seen him since then? A. No, I saw Gargo, about, I saw him about a month before he got killed.

Q. And you know Gargo was killed? A. Yes, I know Gargo, I knew him from, I knew him, I saw him the same week that he got killed. I knew he was killed.

Q. Do you know if either Gargo or George or yourself, did anyone take any money or take anything from either the girl or the man that George was holding the gun on? A. No, I don't think no money was taken. The girl, like, the girl, she was there in person, in physical but like no one didn't say nothing to her. She was just standing, you know.

Q. That is all I want to ask. Thank you. No further questions.

OPINION

(SAME TITLE)

COOKE, J.:

The issue in this case is whether an alleged error in the trial court's charge to the jury, to which no exception was taken, is reviewable in this court on the theory that defendant was deprived of a fair trial.

Defendant was convicted, following a jury trial, of the crimes of murder, attempted robbery in the first degree and attempted grand larceny in the third degree. He admitted that on August 13, 1971 he was present during an attempted robbery of a couple in Lincoln Terrace Park by his two companions, George and Gargo (both of whom were dead at the time of trial). During the course of the attempted robbery, one of the victims, Germaine Philips, was shot by either George or Gargo and subsequently died from the wound. Defendant denied knowing that either of his companions was planning to commit a crime or that they were armed. He also denied any participation in the attempted robbery or larceny.

Alberto Greene, the other victim of the crime, testified that two of his assailants were armed, one with a gun, the other with a knife. The third, admittedly the defendant, was apparently unarmed. However, he testified that this third participant cut off his path of escape in the course of the robbery attempt by stepping towards a wall.

Another witness, Rudolph Mills, testified that earlier that evening, defendant and Gargo left his apartment after one of them said he needed money urgently. Defendant had informed Mills that George had a gun and he admitted to Detective Philip Iannuccilli, to whom he first revealed his

presence at the scene of the crime, that on that fateful night, he and his companions were looking for a prostitute and a pimp "to take them off".

These facts would warrant a jury finding that defendant, acting with the requisite culpable mental state, intentionally aided George and Gargo in the commission of the crime of attempted robbery during which one of the participants, known to him to be armed, caused the death of a victim (Penal Law, §§20.00, 110.00, 160.15, 125.25, subd. (3), pars. [c] and [d]).

The charge to the jury left something to be desired. In at least two places it misstated a fact by informing the jury that defendant had interposed an affirmative defense (Penal Law, §125.25, subd. 3). There was no basis in fact for that statement since defendant had denied all knowledge of and participation in the underlying crimes. At other times, the statement of the applicable law was confusing and misleading. Illustrative of the latter defect is the court's statement: "The People have the burden of proof beyond a reasonable doubt *except in certain instances * * **" (emphasis supplied)

However, the charge, read as a whole, though ineptly phrased, correctly informed the jury that the burden of proof of guilt beyond a reasonable doubt was upon the People and that, if defendant was found guilty of attempted robbery, the burden of proof of the affirmative defense to felony murder was upon him to establish by a fair preponderance of the evidence.

No request to charge made by defense counsel was rejected by the court and, at the conclusion of the corrective statements requested by counsel, in response to a question by the trial judge, said counsel declared "I have no exceptions."

Except in the instance of an appeal taken directly to the Court of Appeals pursuant to sections 450.70 and 450.80 of the Criminal Procedure Law, applicable to capital cases, the jurisdiction of the Court of Appeals in criminal cases is limited to considering questions of law (CPL 470.35). With respect to a ruling or instruction of a criminal court during a trial or proceeding, a question of law is presented "when a protest thereto was registered by the party claiming error, at the time of such ruling or instruction or at any subsequent time *when the court had an opportunity of effectively changing the same.*" (CPL 470.05, subd. 2 [emphasis supplied]). The failure to object to the charge in this case or to request further clarifications at a time when the error complained of could readily have been corrected preserved no questions of law reviewable in this Court (*People v. Reynolds*, 25 N.Y.2d 489; *People v. Schwartzman*, 24 N.Y.2d 241, 251, cert. denied 396 U.S. 846; *People v. Simons*, 22 N.Y. 2d 533, 541, cert. denied 393 U.S. 1107; *People v. Adams*, 21 N.Y.2d 397, 403). We note in this regard that counsel for both sides are not without responsibility in protecting the substantial rights of the parties and that that responsibility extends to calling the attention of the court to errors of law which adversely affect a client *at a time when such errors are correctible.*

Although this Court cannot review the alleged errors in the charge for the reasons indicated, appellant has not been deprived of a forum in which his arguments can be heard. We recognize that the Appellate Division is statutorily empowered to "consider and determine any question of law or issue of fact involving error or defect in the criminal court proceedings which may have adversely affected the appellant" (CPL 470.15, subd. 1), even though no protest was registered at the trial (CPL 470.15, subds.

(3) and (6), par. [a]; *People v. Cipolla*, 6 NY 2d 922, 923. See Denzer, Practice Commentary, McKinney's Cons. Laws of N.Y., Book 11A, CPL 470.15, pp. 578-79). It was within the sole discretion of the Appellate Division to consider appellant's claim of errors in the charge (*People v. Kibbe*, 35 N.Y.2d 407, 413-414; see, also, Cohen & Karger, Powers of the New York Court of Appeals, §155). That court, however, unanimously affirmed the judgment.

We are constrained here to affirm the order of the Appellate Division since the alleged errors are not reviewable in this court in the absence of a proper exception or request (CPL 470.05, subd. 2).

Order affirmed.

DISSENTING OPINION

(SAME TITLE)

WACHTLER, J. (dissenting):

I agree with the majority that the court's instructions regarding the People's obligation to establish guilt beyond a reasonable doubt were at least "confusing", "misleading" and "ineptly phrased". I do not agree that the error is not reviewable by this court because defense counsel failed to object or except to the charge. The general rule precluding our court from reviewing an error unless an objection was voiced at trial, does not apply where we are called upon to "review a deprivation of a fundamental constitutional right". (See, e.g., *People v. McLucas*, 15 N.Y.2d 167, 172; *People v. Miles*, 289 N.Y. 360, 363; *People v. Bradner*, 107 N.Y. 1, 5; *Cancemi v. People*, 18 N.Y. 128; see also *Henry v. Mississippi*, 379 U.S. 443.)

Few principles of criminal law are more fundamental than the prosecutor's burden of proving guilt beyond a reasonable doubt. And "[l]est there remain any doubt about the constitutional statute of the reasonable-doubt standard" the Supreme Court has said, "we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." (*In re Winship*, 397 U.S. 358, 364).

In this case the error can not be said to be harmless, and the majority, quite appropriately, makes no effort to show that it was. The proof at this trial clearly placed the defendant at the scene, in the company of the two armed robbers. The only issue seriously contested was whether he knowingly assisted them in the commission of the crimes since his conduct was, at best, ambiguous and as the majority notes, he specifically "denied all knowledge of or participation in the crimes." The trial court confused this with an affirmative defense and in effect charged the jury that although the People had the burden of proving guilt beyond a reasonable doubt, the defendant was required to prove the truth of his denials.

This was fundamental error whether considered in the abstract or in the context of this particular case. I would reverse and grant a new trial.

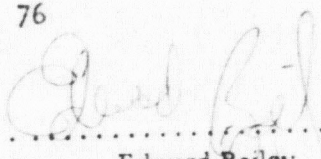
Order affirmed. Opinion by Cooke, J. All concur except Wachtler, J., who dissents and votes to reverse in an opinion.

AFFIDAVIT OF PERSONAL SERVICE

STATE OF NEW YORK,
COUNTY OF RICHMOND ss.:

EDWARD BAILEY being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 30 day of April, 19 76 at No. 2 World Trade Center, NYC deponent served the within Appendix upon Hon. Louis J. Lefkowitz, Atty. General the Appellees herein, by delivering a true copy thereof to him personally. Deponent knew the person so served to be the person mentioned and described in said papers as the Appellees therein.

Sworn to before me,
this 30 day of April 19 76


.....
Edward Bailey


.....
WILLIAM BAILEY

Notary Public, State of New York
No. 43-0132945

Qualified in Richmond County
Commission Expires March 30, 1977